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In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

No. 79-1709

THOMAS J. ALBERNAZ AND
EDWARD RODRIGUEZ,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Table of Contents.

Introductory statement 2

Proceedings below 3

Jurisdiction 4

Constitutional provisions and statutes involved 5

Questions presented 7

Statement of the case 8

Reasons why the writ should be granted 9

I. Analysis of the statutory scheme and its legislative history demonstrates the absence of any clear Congressional intent to impose double punishment for a single conspiracy charged in two counts 11

II. This Court should grant certiorari to resolve what is perhaps the last major undecided area of this Court's double jeopardy jurisprudence — the applicability of the Double Jeopardy Clause to the imposition of legislatively authorized multiple punishment in a single criminal proceeding for violations of separate statutes alleged to constitute "the same offense" 19

III. The "Blockburger" test should be rejected as the sole basis for determining whether two charged conspiracies are, in fact, "the same offense" 22

Conclusion 25

Appendix follows page 25

Opinion of United States Court of Appeals for the Fifth Circuit, November 14, 1978 1a

Letter from Clerk of Court of Appeals to counsel of record, November 28, 1978 22a

Opinion of United States Court of Appeals for the Fifth Circuit, February 27, 1980 26a

Order of Mr. Justice Powell extending time for filing petition for writ of certiorari 56a

Table of Authorities Cited.

CASES.

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 22n

Bell v. United States, 349 U.S. 81 (1955) 12

Blockburger v. United States, 284 U.S. 299 (1932) 7, 11, 22, 23, 24

Braverman v. United States, 317 U.S. 49 (1942) 15, 21, 22n, 24

Brown v. Ohio, 432 U.S. 161 (1977) 20, 21, 22, 23

Callanan v. United States, 364 U.S. 587 (1961) 15, 16

Iannelli v. United States, 420 U.S. 770 (1975) 15

Ingram v. United States, 360 U.S. 672 (1959), reh. denied, 361 U.S. 856 (1959) 23

Jeffers v. United States, 432 U.S. 137 (1977) 12, 13n, 21

Ladner v. United States, 358 U.S. 169 (1958) 12

Sanabria v. United States, 437 U.S. 54 (1978) 22n

Simpson v. United States, 435 U.S. 6 (1978) 12, 18, 21

United States v. Adcock, 487 F.2d 637 (6th Cir. 1973) 10, 18

United States v. Bolts, 558 F.2d 316 (5th Cir. 1977), cert. denied, 434 U.S. 930 (1977), 439 U.S. 898 (1978) 10

United States v. Garner, 574 F.2d 1141 (4th Cir. 1978), cert. denied, 439 U.S. 936-937 (1978) 10, 18

United States v. Honneus, 508 F.2d 566 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975) 10, 17, 18

United States v. Leong, 536 F.2d 993 (2d Cir. 1976), cert. denied, 429 U.S. 924 (1976) 10

United States v. Mallah, 503 F.2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975) 23

United States v. Marotta, 518 F.2d 681 (9th Cir. 1975) 10, 17, 18

United States v. Palermo, 410 F.2d 468 (7th Cir. 1969) 23

United States v. Papa, 533 F.2d 815 (2d Cir. 1976), cert. denied, 429 U.S. 961 (1976) 23

United States v. See, 505 F.2d 845 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975) 10

United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952) 12

United States v. Young, 502 F.2d 1072 (3d Cir. 1974) 23

Whalen v. United States, No. 78-5471 (April 16, 1980) 3, 11, 12, 18, 19, 21

CONSTITUTIONAL PROVISIONS AND STATUTES.

United States Constitution, Fifth Amendment, Double Jeopardy Clause 2, 3, 5, 7, 11, 19, 20 et seq.

Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801 et seq. 10, 13, 14, 16
§ 841 5
§ 844 17n
§ 846 2, 3, 5, 7, 8, 10, 12 et seq.
§ 848 13n
§ 952 6
§ 960 17n
§ 963 2, 3, 7, 8, 10, 12, 17 et seq.
28 U.S.C. § 1254(1) 4

MISCELLANEOUS.

H.R. No. 91-1444, 1970 U.S. Code, Cong. & Adm. News 4566 14

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No. .

THOMAS J. ALBERNAZ AND
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Thomas Albernaz and Edward Rodriguez petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in this case on November 14, 1978, and February 27, 1980.

Introductory Statement.

This case presents this Court with an opportunity to resolve a question which has divided the Circuits — whether consecutive sentences may be imposed where a single conspiracy to import and distribute marijuana has been subdivided into a two-count indictment charging a conspiracy to import in violation of 21 U.S.C. § 963 and a conspiracy to distribute in violation of 21 U.S.C. § 846.

Petitioners received consecutive sentences pursuant to their convictions on a two-count indictment charging them with conspiracy to import and conspiracy to distribute. Although finding that, in fact, only a single conspiracy with multiple objectives existed, the court below affirmed the consecutive sentences, holding, first, that Congress intended for both statutes to apply separately and consecutively to such an agreement (A. 29a), and second, deciding an issue which has still not been squarely resolved by this Court (A. 44a), that where Congress intended to permit the imposition of consecutive sentences, sentencing a defendant to cumulative punishment in one proceeding did not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution (A. 43a).

Whether an individual is subject to a potential term of incarceration of five or ten years for the same offense should not, as it does currently, depend on the locus of the prosecution. The conflict between the Circuits as to whether Congress intended to permit the imposition of consecutive sentences is an issue that affects the fair and equitable administration of justice throughout the federal system and is one that should be resolved by this Court.

If this Court determines that Congress did intend to permit the imposition of consecutive sentences, this case provides the perfect vehicle for resolution of what is perhaps the last major

unresolved issue related to the scope of the Double Jeopardy Clause. Whether the scope of the Double Jeopardy Clause is governed exclusively by legislative intent in cases involving the imposition of multiple punishment in a single prosecution was raised, but not decided in this Court's four opinions in *Whalen* v. *United States*, No. 78-5471 (April 16, 1980). Definitive guidance from this Court is critical for both courts and legislatures so that the sentencing structures may be responsibly promulgated by legislatures and properly applied by courts, consonant with the strictures of the Double Jeopardy Clause. Accordingly, this case presents this Court with an opportunity to resolve at least one and possibly two heretofore undecided questions important to the fair and equitable administration of justice throughout the federal system, and certiorari should be granted.

Proceedings Below.

Following a jury trial in the United States District Court for the Southern District of Florida (Atkins, J.), petitioners Thomas Albernaz and Edward Rodriguez were convicted of conspiracy to import marijuana (count 1) and conspiracy to distribute marijuana (count 2) in violation of 21 U.S.C. §§ 846 and 963. Albernaz was sentenced to a 3½ year term of imprisonment and a special parole term of two years on each count with the sentences to be served consecutively, for a total sentence of seven years imprisonment and four years parole. Rodriguez received consecutive sentences of 4½ years confinement and a special parole term of two years for a total sentence of nine years imprisonment and four years parole.

Petitioners appealed from the judgments of the District Court entered on May 26, 1977. Their convictions were af-

firmed by the United States Court of Appeals for the Fifth Circuit on November 14, 1978, with the imposition of consecutive sentences being affirmed on the basis of prior Fifth Circuit decisions, despite the panel's conclusion that "[w]ere we free to consider that problem anew, we would conclude . . . that the double jeopardy clause prohibits the punishment of a single conspiracy by more than one penalty" (A. 17a). The court's opinion is reported at 585 F.2d 1234 (5th Cir. 1978), and is reproduced in the Appendix at 1a-21a. On November 20, 1978, the court, on its own motion, ordered rehearing en banc, and in a letter dated November 28, limited en banc consideration to the question of whether, "[i]f the same agreement is charged as a violation of both 21 U.S.C. § 846 and 21 U.S.C. § 963, and the defendants are convicted of both offenses, may separate sentences be imposed for each offense?" The court also extended the time for filing a petition for panel rehearing to December 12, 1978, "[i]n order to preserve [petitioners'] right as to other issues in the case" (A. 22a-23a).[1]

On February 27, 1980, the court, en banc, affirmed petitioners' convictions. The opinion, not yet reported, is reproduced in the Appendix at 26a-55a.

Jurisdiction.

The original judgment of the Court of Appeals was entered on November 14, 1978, and affirmed, en banc, on February 27, 1980. The time for filing a petition for a writ of certiorari was enlarged to April 27, 1980, by Mr. Justice Powell (A. 56a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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[1] A timely petition for rehearing, raising a number of other issues, was filed and remains outstanding.

Constitutional Provisions and Statutes Involved.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ..

21 U.S.C. § 841 provides in pertinent part:

> *Prohibited Acts A — Unlawful acts*
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 846 provides:

> *Attempt and conspiracy*
>
> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 952 provides in pertinent part:

Importation of controlled substances — Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that —

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States —

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General may prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

21 U.S.C. § 963 provides:

> *Attempt and conspiracy*
>
> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Questions Presented.

I. Whether Congress intended to permit the imposition of consecutive sentences where a single conspiracy with the dual objectives of importing and distributing marijuana has been subdivided into a two-court indictment charging a conspiracy to import marijuana in violation of 21 U.S.C. § 963 in count 1 and a conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 in count 2?

II. Whether the Double Jeopardy Clause precludes the imposition of cumulative punishment upon conviction for a single conspiracy charged as two separate statutory violations in a single criminal proceeding even if Congress intended that multiple penalties be imposed?

III. Whether the "*Blockburger*" test should be rejected as the means for determining whether two or more alleged conspiracies in fact constitute "the same offense" for purposes of the Double Jeopardy Clause, and a broader test, encompassing scrutiny of the terms of the charging indictment and the facts alleged, must be employed?

Statement of the Case.

On December 26, 1976, petitioner Albernaz and DEA agent Theodore Weed, posing as a man with a boat and access to other boats, began negotiations for Weed to offload 15,000-20,000 pounds of marijuana from a freighter at sea and bring it back into a port. Over the course of the next month, Weed was introduced to Rodriguez and other individuals purportedly acting with petitioners. There were a number of meetings between Weed, Albernaz, Rodriguez and others with a number of plans and changes of plans as to the amount of marijuana involved, the boat to be used, and the selection of an offload site.

On January 27, 1977, a vessel crewed by DEA agents, Customs Agents, and DEA civilian employees left West Palm Beach to meet the freighter 200-225 miles east of the United States. They were to offload 1,100 bales of marijuana weighing approximately fifty pounds each. Two days later petitioners and another individual chartered a plane to assist in the rendezvous, which was not completed due to darkness. The following day the rendezvous was made, the offloading began, the Coast Guard was called, the cargo was seized and thirteen men on board the freighter were arrested.[2] Petitioners and two others were arrested in Miami that night.

A two-count indictment charging eighteen individuals, including petitioners, with conspiracy to import marijuana in violation of 21 U.S.C. § 963 (count 1) and conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 (count 2) was returned in the Southern District Court of Florida. But for the reference to importation in count 1 and distribution in count 2, and the citation to different subsections of Title 21 of

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[2] The thirteen members of the crew were charged as co-conspirators. They were tried separately.

the United States Code, the two counts were identical; each charged, in precisely the same language, the same eighteen persons with a conspiracy extending from mid-December, 1976, to February 1, 1977, at Fort Lauderdale, Florida, and other places, involving thirty tons of marijuana and containing the exact same overt acts — a series of meetings and inspection of offload sites.

Albernaz, Rodriguez and two others were tried jointly and convicted on both counts. All but one received consecutive sentences. On appeal, the court affirmed petitioners' two convictions. Although determining that there had been only one conspiracy and stating that, if free to do so, it would not affirm the imposition of consecutive sentences, the panel felt constrained to uphold the sentences under prior case law of the Circuit.

On rehearing, en banc, limited to the question of the propriety of the imposition of consecutive sentences where one agreement was charged as violative of two separate statutory provisions, the court affirmed the sentences, finding a single agreement, but holding that the only relevant question was whether Congress intended to permit the imposition of consecutive sentences, and answering that question in the affirmative. According to the court below, this Court "has recognized that the Double Jeopardy Clause imposes no limits on Congress's power to define the allowable unit of prosecution and punishment, at least so long as all charges are brought in a single proceeding" (A. 48a).

Reasons Why the Writ Should be Granted.

Whether consecutive sentences can be imposed when a single conspiracy with the multiple objectives of importation

and distribution of a controlled substance is subdivided into a two-count indictment, with one count charging a violation of 21 U.S.C. § 963 and the second count charging a violation of 21 U.S.C. § 846, is a question that has divided the Courts of Appeals. Compare the decision below, *United States* v. *Marotta*, 518 F.2d 681 (9th Cir. 1975), and *United States* v. *Garner*, 574 F.2d 1141 (4th Cir. 1978), cert. denied, 439 U.S. 936-937 (1978), with *United States* v. *Adcock*, 487 F.2d 637 (6th Cir. 1973), and *United States* v. *Honneus*, 508 F.2d 566 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975). Thus, at the current time, whether an individual will be subjected to a potential maximum period of five or ten years incarceration for the same conduct depends on the locus of the prosecution and whether the prosecutor has chosen to allege a single conspiracy with multiple objectives in one count or to divide that single conspiracy into two counts. Compare the case below with *United States* v. *Bolts*, 558 F.2d 316 (5th Cir. 1977), cert. denied, 434 U.S. 930 (1977), 439 U.S. 898 (1978); *United States* v. *See*, 505 F.2d 845 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975); *United States* v. *Leong*, 536 F.2d 993 (2d Cir. 1976), cert. denied, 429 U.S. 924 (1976). The number of prosecutions brought nationwide under 21 U.S.C. §§ 801 et seq. is substantial and resolution of the question by this Court is necessary to assure the uniform, consistent and even-handed administration of justice throughout the country.

The decision below raises a number of related, unresolved questions ripe for determination by this Court. First, did Congress intend for 21 U.S.C. §§ 846 and 963 to apply separately and consecutively to a single agreement to import and distribute a controlled substance charged as two offenses, or, as the dissent below stated, is the existence of two separate conspiracy provisions simply a result of the vagaries of the legislative process which divided consideration of the legislation proposed to the Congress by the President between two

separate Congressional subcommittees? (See A. 50a.) This question has divided the Circuits.

Second, if this Court finds that Congress did intend to impose multiple punishment, does the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution proscribe the imposition of consecutive sentences imposed in a single prosecution if the two separately charged offenses are in fact "the same"? The scope of the protection against multiple punishments imposed at a single proceeding afforded by the Double Jeopardy Clause is a question discussed and left unresolved in the four opinions of this Court in *Whalen* v. *United States*, No. 78-5471 (April 16, 1980), as this Court found that Congress had not authorized the imposition of consecutive sentences in the case before it and, therefore, found it unnecessary to reach the constitutional question. It is, as Mr. Justice Blackmun noted, a question which has generated much confusion among the courts and one which is undeniably in need of clarification. Thus, if this Court determines that Congress did intend to permit consecutive sentences under the circumstances presented by the case at bar, this case provides the perfect vehicle for resolving the issue left open in *Whalen* and providing both the courts and legislatures with much-needed guidance as to the scope of the Double Jeopardy Clause.

Third, if the Double Jeopardy Clause provides substantive protection independent of Congressional intent, is the so-called "*Blockburger*" test the only appropriate method of determining whether two alleged conspiracies are "the same"?

I. Analysis of the Statutory Scheme and its Legislative History Demonstrates the Absence of Any Clear Congressional Intent to Impose Double Punishment for a Single Conspiracy Charged in Two Counts.

To find Congressional intent to authorize double punishment for a single conspiracy charged as violative of two

separate statutory provisions, this Court must find a clear, unambiguous expression of Congressional purpose; an indefinite intent will not suffice, for in determining whether pyramided penalties were intended, the Court must apply the "established rule of construction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Simpson* v. *United States*, 435 U.S. 6, 14 (1978). See also *Ladner* v. *United States*, 358 U.S. 169, 177-178 (1958); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952); *Whalen* v. *United States*, No. 78-5471 (April 16, 1980), slip opinion, pp. 10-11 n.10. Indeed, this Court "has steadfastly insisted that 'doubt will be resolved against turning a single transaction into multiple offenses.'" *Simpson, supra*, 435 U.S. at 15. As this Court emphasized in *Bell* v. *United States*, 349 U.S. 81, 83 (1955), in reversing a double punishment under the Mann Act:

> It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

Petitioner submits that, contrary to the decision below, any intent of Congress to authorize the imposition of multiple sentences on an individual convicted of a single conspiracy with a dual objective, charged under both 21 U.S.C. § 846 and 21 U.S.C. § 963, is far from unambiguous. Surely, the mere fact that the two statutory provisions exist is not, alone, sufficient to find a clear affirmation of an intent to impose multiple punishments where one transaction violates both provisions. See, e.g., *Simpson* v. *United States, supra*; *Jeffers* v. *United States*, 432 U.S. 137 (1977).

The court below found specific legislative intent to impose consecutive sentences on a concededly sparse legislative history. Stating that this was "carefully drafted legislation"

evidencing "a great deal of coordination between the two committees" (A. 30a), it found the existence of parallel penalty structures significant because the penalties were different from those initially proposed by the President. Finally, it found the passage of an amendment providing that the two conspiracy provisions would take effect at the same time "indicative of the nonaccidental nature of the two specific conspiracy provisions" (A. 39a).[3]

Petitioner submits that a finding that the two conspiracy provisions were "nonaccidental" does not lead to the conclusion that the intent was to authorize consecutive sentences for a single conspiracy with multiple objectives charged as violating both provisions. Rather, the "legislative history" simply demonstrates a Congressional intent to punish *all* conspiracies, whether domestic or international in scope.

The two provisions are part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (in relevant part 21 U.S.C. §§ 801 et seq., hereafter "the Act"), a comprehensive set of provisions designed to deal with all aspects of the problems of drug abuse prevention and control. The Act sets up a dual structure with separate subchapters addressed to the regulation of domestic use/misuse of drugs designated as controlled dangerous substances (subchapter I), and the regulation of importation and exportation of such substances (subchapter II). As explained in the House Report accompanying passage of the Act, the division in the statutory scheme between domestic offenses, on the one hand, and importation

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[3] The court also relied on a Congressional intent severely to punish those engaged in drug dealing. However, that alone cannot justify a finding of intent to impose multiple punishment for a single conspiracy. See, e.g., *Jeffers* v. *United States*, 432 U.S. 137 (1977), where, although the same intent to impose severe punishment resulted in the enactment of 21 U.S.C. § 848, this Court held that Congress did not intend to allow cumulative punishment for violations of 21 U.S.C. §§ 846 and 848.

and exportation, on the other, was a byproduct of the intricacies of committee jurisdiction in the House of Representatives when the proposed legislation was originally submitted to Congress by the President. H.R. No. 91-1444, 1970 U.S. Code, Cong. & Adm. News, pp. 4566-4657. Since, as proposed by the President, the legislation was to repeal certain tax and other laws which, up until that time, had been used to control narcotic drugs, the legislation was first referred to the House Committee on Ways and Means.[4] That Committee, however, "decided to consider only the provisions relating to imports and exports of narcotic drugs" (*id.* at 4567) and transferred the remaining provisions — relating to domestic regulation and control — to the Interstate and Foreign Commerce Committee (*id.*). When the legislation was reported from those committees to the floor of the House of Representatives, the division between domestic provisions and import-export provisions was maintained in order "to preserve the jurisdiction of the Ways and Means Committee over future amendments to its legislation relating to imports and exports of drugs covered by the bill" (*id.* at 4568). It was in that dual form that the bill was enacted. In light of this history, it is evident that the division of the Act into a dual structure was the result of a Congressional concern with *committee jurisdiction* — and *not* the result of some other clear Congressional intent.

Nor is there any affirmative indication in the legislative history that by including a conspiracy provision in each subchapter Congress clearly intended to authorize double punishment for one drug conspiracy. H.R. No. 91-1444 contains no

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[4] Since the President's proposed legislation also dealt with drugs regulated under the Federal Food Drug and Cosmetic Act, the legislation was divided into two bills — generally "identical, except with respect to the drugs covered by these provisions" (*id.* at 4567) — with Ways and Means considering the bill covering narcotic drugs and marijuana and the Interstate and Foreign Commerce Committee considering the bill covering other drugs.

reference to the conspiracy provisions at all, other than to state, as part of its section-by-section analysis, that they exist. The Congressional debates are similarly devoid of any indication that Congress even *considered* the possibility of multiple punishment for a single conspiracy with objectives on both sides of the subchapter divisions, remaining absolutely *silent* as to the intent behind the enactment of two conspiracy provisions.

In light of this Congressional silence — and given the statutory division between what are essentially internal, domestic offenses and offenses involving a combination of foreign and domestic components — petitioners submit that the inclusion of a conspiracy section in each subchapter cannot be read to reflect anything more than a Congressional intent to ensure that drug conspirators, whether involved in domestic or international traffic, would be punished — an intent to ensure that no drug conspirator would slip through the net because of the divided structure of the statutory scheme.

The purpose behind the criminalization of conspiracy is, as this Court has stated, based on the fact that "'collective criminal agreement — partnership in crime — presents a greater potential threat to the public than individual delicts. . . . [T]he danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.'" *Iannelli* v. *United States*, 420 U.S. 770, 778 (1975), quoting *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961). Thus, it is the agreement that constitutes the offense and its criminal nature is neither enhanced nor lessened by the number of objects encompassed within its contemplated scope. See, e.g., *Braverman* v. *United States*, 317 U.S. 49, 53 (1942):

> Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement

> which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

Since it is the agreement and not its objects that Congress intended to punish by enacting the conspiracy provisions of the Act,[5] the existence of two separate provisions can be attributed to a Congressional intent to punish all separate agreements, and not to impose multiple punishment for a single agreement to commit more than one substantive offense, for as "predominately a lawyers' body" (*Callanan* v. *United States*, 364 U.S. at 594) Congress must be presumed to know that a single conspiracy with multiple objectives remains a single conspiracy.

This is not a case in which an individual has agreed to import marijuana with one group and made a separate agreement to distribute marijuana with another group. Nor is it a case in which an individual has agreed to import marijuana and, later, entered into a second, separate, agreement to distribute. In these hypothetical instances, there are two separate agreements for which an individual could receive consecutive sentences. Here, however, the court below explicitly found a single agreement with multiple objectives — a single agreement that affords a single basis for conspiratorial liability and, petitioners submit, permits imposition of but a single punishment.

There is, then, absolutely *no* evidence, either in the statutory scheme itself or in its legislative history — apart from the mere fact that the two provisions exist — which can support a

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[5] Thus, the fact that Congress intended to authorize cumulative punishment for the substantive offenses forming the objects of a conspiracy is irrelevant to a determination whether cumulative punishment for a single agreement with multiple objectives was intended.

finding or even an inference of a clear Congressional intent to inflict double punishment for a single conspiracy with a dual objective which straddles the artificially created subchapter lines. The offense which is penalized by both 21 U.S.C. § 846 and 21 U.S.C. § 963 is the making of an *unlawful agreement* to commit a narcotics violation and *not* the statutorily described object of that agreement.

That the Congressional intent is at best *unclear* is strikingly illustrated by the fact that two different United States Courts of Appeals have come to exactly opposite conclusions about what Congress intended. One Circuit — the First — concluded that Congress did *not* mean, by its enactment of both §§ 846 and 963, to authorize the imposition of multiple punishments for one conspiracy. *United States* v. *Honneus*, 508 F.2d 566, 569 (1st Cir. 1974). Another Circuit — the Ninth — found that Congress *did* intend to permit double punishment where both of these provisions were violated. *United States* v. *Marotta*, 518 F.2d 681, 685 (9th Cir. 1975).[6]

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[6] The ambiguity as to Congressional intent is further illustrated by the confusion in the *Marotta* court's analysis. According to that court's determination of Congressional intent, "Congress has in effect determined that a conspiracy to import drugs with intent to distribute is twice as serious as a conspiracy to import for personal use or a conspiracy to possess with intent to distribute." 518 F.2d at 685. In making this assertion, the *Marotta* court was apparently under the mistaken impression that a "conspiracy to import for personal use," like a "conspiracy to possess with intent to distribute," would violate only *one* of the two conspiracy provisions. But what the *Marotta* court apparently failed to notice is that, while a "conspiracy to possess with intent to distribute" would, indeed, violate only § 846 (because only one substantive offense — that of possession with intent to distribute in violation of § 844 — would be implicated), a "conspiracy to import for personal use" would violate *both* § 846 *and* § 963 (because not one, but two substantive offenses would be implicated: importation in violation of § 960, and "personal use," which is the equivalent of simple possession, in violation of § 844). Therefore, under the *Marotta* court's view of the statutory scheme, a "conspiracy to import for personal use" could, just like a "conspiracy to import with intent to distribute," result in the imposition of double

Plainly, had Congress expressed its intent in the clear, unambiguous way which is required before multiple criminal sanctions may be imposed, such sharp disagreement as to Congressional intent could not arise. The existence of ambiguity mandates that the still-vital policy of lenity (see *Simpson, supra*; *Whalen, supra*) which militates against double punishment, must come into play. Simply stated, given the absence of an explicit indication by Congress, this court cannot *assume* an intent to impose multiple punishments. Thus in light of the stark silence in the legislative record, Congressional intent must, at best, be found ambiguous, and, under the rule of lenity, multiple penalties for a single conspiracy charged under both 21 U.S.C. § 846 and 21 U.S.C. § 963 must be proscribed as a matter of statutory construction.

Since this is an issue that has divided the Circuits — compare the decision below, *United States* v. *Marotta, supra,* and *United States* v. *Garner, supra,* with *United States* v. *Honneus, supra,* and *United States* v. *Adcock, supra* — and one which, in light of the numerous prosecutions brought under these statutes, has farreaching import for the equitable administration of justice throughout the federal system, this Court should grant certiorari and provide the courts with a definitive answer.

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punishment — despite the court's belief that Congress had determined that "conspiracy to import for personal use" was less serious than "conspiracy to import with intent to distribute."

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHAT IS PERHAPS THE LAST MAJOR UNDECIDED AREA OF THIS COURT'S DOUBLE JEOPARDY JURISPRUDENCE — THE APPLICABILITY OF THE DOUBLE JEOPARDY CLAUSE TO THE IMPOSITION OF LEGISLATIVELY AUTHORIZED MULTIPLE PUNISHMENT IN A SINGLE CRIMINAL PROCEEDING FOR VIOLATIONS OF SEPARATE STATUTES ALLEGED TO CONSTITUTE "THE SAME OFFENSE."

As stated in the opinion below, whether the scope of the Double Jeopardy Clause is exclusively controlled by legislative intent in cases challenging the imposition of multiple punishments at a single criminal proceeding is an issue which this Court has not yet squarely confronted (A. 44a). This Court's recent decision in *Whalen* v. *United States, supra,* noted the unsettled nature of this issue and the need for clarification but left it unresolved, further increasing the need for a definitive ruling by this Court to provide guidance to both the courts and legislatures in what is perhaps the last major undecided area of double jeopardy jurisprudence.

In *Whalen,* this Court determined that consecutive sentences could not be imposed on an individual convicted under the District of Columbia Code of the separate statutory offenses of rape and killing the same victim in the perpetration of the rape. The holding was based on a construction of the relevant statutory provisions, with this Court finding that Congress had not authorized cumulative punishment. In accordance with the policy of avoiding constitutional rulings where a statutory ruling will suffice, this Court did not reach the issue whether the Double Jeopardy Clause would bar the imposition of consecutive sentences if Congress intended to permit their imposition for the violation of separate statutes by one criminal offense.

The Court's four opinions raise, in dicta, but do not decide, the issue which (if the consecutive sentences imposed here are

found to be legislatively authorized, but see section I, *supra*) this case squarely presents. The majority left open the question whether the scope of the Double Jeopardy Clause's prohibition on multiple punishment for the same offense is governed exclusively by legislative intent, stating that "the Double Jeopardy Clause *at the very least* precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so" (slip opinion, p.4) (emphasis added), thereby suggesting that further protection may be afforded. See also *Brown* v. *Ohio*, 432 U.S. 161 (1977). The concurring and dissenting opinions, noting the confusion among the courts that the Court's jurisprudence in this area has engendered, suggested that, at least insofar as multiple punishments imposed in a single proceeding are concerned, legislative intent is controlling (see, e.g., concurring opinion of Mr. Justice White; concurring opinion of Mr. Justice Blackmun, at pp. 2-3; and dissenting opinion of Mr. Justice Rehnquist, joined by the Chief Justice, at p. 7).

Because of the importance of this issue to the administration of justice throughout the federal system, both the courts and the legislatures are in need of definitive guidance from this Court as to the role of the Double Jeopardy Clause in the multiple punishment area and the parameters of its intersection with the legislature's authority to define offenses and prescribe punishment. The courts must be told what, if any, limitations the Double Jeopardy Clause places on the imposition of consecutive sentences in a single criminal proceeding where it is contended that different statutory violations constitute "the same offense." Legislatures must be provided guidance so that they may act responsibly in promulgating new statutes and reviewing extant legislation.

If one of the primary purposes of the Double Jeopardy Clause is to protect against multiple punishments for the same offense (see, e.g., *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977)),

petitioners submit that effectuation of that protection requires that, if necessary, the courts independently assess statutes claimed to penalize "the same offense" regardless of legislative intent. As suggested by this Court in *Simpson* v. *United States*, 435 U.S. 6 (1978), and *Jeffers* v. *United States*, 432 U.S. 137 (1977), a two-stage inquiry is necessary. First, Congressional intent must be examined, and, if no intent to impose cumulative punishment for statutes challenged as penalizing "the same offense" is found, no further inquiry is necessary, for the multiple punishment is not legislatively authorized, and "the Double Jeopardy Clause *at the very least* precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so." *Whalen* v. *United States*, *supra*, slip opinion, p. 4 (emphasis added). However, if an intent to impose cumulative punishment is found, the Court must take the second step and analyze the statutory provisions to determine whether they, in fact, penalize "the same offense." Anything less would leave the scope of the Double Jeopardy Clause totally dependent on legislative and prosecutorial whim and render it a nullity in protecting against multiple punishment for the same offense.

In *Braverman* v. *United States*, 317 U.S. 49 (1942), this Court held that a single conspiracy alleged to violate seven statutes constituted a single offense and could not be subdivided into seven separate offenses so as to permit the imposition of pyramided penalties. Although the Double Jeopardy Clause was not specifically mentioned in the opinion, petitioners submit that its ban on multiple punishment for the same offense provided the underlying basis for this Court's decision and mandates a similar decision here. That the "conspiracies" in *Braverman* were all charged under one conspiracy statute, while the "conspiracies" in this case were charged under two conspiracy provisions, is a distinction without a constitutionally significant difference. As *Brown* v.

Ohio, supra, makes clear, for purposes of considering whether multiple punishment is barred by the Double Jeopardy Clause, the issue is the nature of the offense charged and not whether more than one statutory provision can be applied.[7]

Accordingly, petitioners submit that if the question of legislative intent is resolved adversely to them, this case presents the perfect vehicle for resolving the critical question whether the Double Jeopardy Clause affords any protection against legislative intent to pyramid penalties for "the same offense," and that certiorari should be granted so that this Court can fill a major gap in its double jeopardy jurisprudence.

III. The "Blockburger" Test Should be Rejected as the Sole Basis for Determining Whether Two Charged Conspiracies are, in fact, "the Same Offense."

How the courts are to determine whether two alleged statutory violations constitute "the same offense" also merits the attention of this Court. Petitioners submit that the commonly used "*Blockburger*" test — a test which focuses on the statutory elements of the offense charged and provides that the test for determining whether there are two offenses or only one "is whether each provision requires proof of a fact which the other does not" (*Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)) — is inappropriate as the sole benchmark for determining whether two or more alleged conspiracies are in fact "the same offense" for purposes of the Double Jeopardy Clause. As this Court has noted, it is not the exclusive method of delineating the scope of the protections of the Double Jeop-

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[7] *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), is thus inapposite, since, contrary to the situation presented in *Braverman* and the situation presented here, it involved two separate and distinct conspiracies. See *Sanabria* v. *United States*, 437 U.S. 54, 74 n.33 (1978).

ardy Clause. See *Brown* v. *Ohio*, *supra*, 432 U.S. at 166-167 n.6 (noting that in certain circumstances the *Blockburger* test is not the sole touchstone for analyzing a double jeopardy claim).

Indeed, in analyzing double jeopardy claims in conspiracy cases, a number of courts have recognized that because the nature of a conspiracy is such that it can be alleged in many different forms, standards other than a stringent *Blockburger* "same evidence" test must be applied. Accordingly, these courts have looked at the facts of the case to determine if, as a factual matter, there were two crimes committed or only one. See, e.g., *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975); *United States* v. *Papa*, 533 F.2d 815, 820 (2d Cir. 1976), cert. denied, 429 U.S. 961 (1976); *United States* v. *Young*, 503 F.2d 1072, 1075 (3d Cir. 1974); *United States* v. *Palermo*, 410 F.2d 468 (7th Cir. 1969).

Such scrutiny is demanded by the nature of the crime of conspiracy. A necessary element of the offense is the intent necessary to commit the offense or offenses constituting the object(s) of the conspiracy. See, e.g., *Ingram* v. *United States*, 360 U.S. 672 (1959), reh. denied, 361 U.S. 856 (1959). Thus, examining a single conspiracy with multiple objectives charged as separate conspiracies, will, under the *Blockburger* test, almost inevitably result in a finding of separate offenses, because the intent necessary for each objective of the conspiracy will differ. However, the offense of conspiracy lies in the agreement and not its objects, and the agreement may be single despite a plethora of objectives. Accordingly, *Blockburger* is a totally inadequate basis for determining whether a number of separately charged conspiracies, divided by the object offenses, are in fact a single conspiracy with multiple objectives. Indeed, this Court has recognized the difficulty of applying the *Blockburger* test to a conspiracy situation, stating in *Braverman* v. *United States*, *supra*, 317 U.S. at p.54:

> Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes. See Blockburger v. United States, 284 U.S. 299, 301-304 . . ..

Given these differences, this Court should now recognize the inadequacies of the *Blockburger* test in the context of conspiracies, and in situations where multiple conspiracies are alleged, should require that the court examine the terms of the charging indictment and the facts alleged and make an independent assessment as to whether, in fact, more than one conspiracy exists.

Such an examination here demonstrates that in the case at bar only one conspiracy — and, therefore, one offense — existed, rendering the imposition of consecutive sentences improper.

Conclusion.

For the aforementioned reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES of America, Plaintiff-Appellee,

v.

Edward RODRIGUEZ, a/k/a Rick, Thomas J. Albernaz, Peter Smigowski, and William John Martins, Defendants-Appellants.

No. 77-5339.

United States Court of Appeals, Fifth Circuit.

Nov. 14, 1978.

Defendants were convicted in the United States District Court for the Southern District of Florida, C. Clyde Atkins, Chief Judge, of conspiracy to import marijuana and conspiracy to distribute marijuana, and they appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) there was sufficient evidentiary basis for jury to conclude, beyond reasonable doubt, that defendants were predisposed to import marijuana and were not entrapped into doing so; (2) confession made after being counseled by friend was admissible; (3) reasonable doubt charge did not require reversal; (4) prosecutor's comments that he thought evidence against defendants was overwhelming and that he thought jury could reach only conclusion of guilt did not have prejudicial impact; (5) evidence was sufficient to prove conspiracy to distribute; (6) evidence was not sufficient to sustain distribution conviction of defendants who were peripheral participants in importation scheme and who would not have control over marijuana once it was within United States and (7) separate convictions of conspiracy to import and conspiracy to distribute would be affirmed notwithstanding contention that there was a single illegal agreement.

Affirmed in part, reversed in part and remanded.

1. Criminal Law ⇐569
Drugs and Narcotics ⇐124

There was sufficient evidentiary basis for jury in drug prosecution to conclude, beyond reasonable doubt, that defendants were predisposed to import marijuana into the United States and were not entrapped into doing so nor enmeshed in crime by federal agents. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 1002, 1013, 21 U.S.C.A. §§ 841, 846, 952, 953.

2. Criminal Law ⇐569

Government has ultimate burden of proving beyond reasonable doubt that predisposition and not inducement was cause of crime.

3. Criminal Law ⇐822(8)

Even though trial court did not specifically describe allocation of proof when it discussed entrapment, where trial court properly indicated that reasonable doubt as to inducement required acquittal on drug charges, jury was instructed that general burden of proof beyond reasonable doubt was on Government and it was evident from charge as whole that such allocation governed entrapment defense, charge was not inadequate.

4. Criminal Law ⇐1172.2

When viewed contextually, charge that reasonable doubt means doubt that is based on reason and common sense and that such doubt must be substantial rather than speculative did not constitute reversible error even though it would have been better for charge to have been given in other terms.

5. Criminal Law ⇐822(16)

In reviewing reasonable doubt charges, court looks to whole instruction rather than isolate any particular sentence.

6. Arrest ⇐63.4(6)

Where government agents, at time of defendant's arrest, had no knowledge that he was connected with drug conspiracy although they had seen his name on passenger manifest of chartered aircraft used in conspiracy and were aware that he was in room with conspirator on night of arrest, agents did not have probable cause to arrest defendant.

7. Criminal Law ⇐519(8)

Even though government agents had no probable cause to arrest defendant, where defendant after his arrest was advised of his constitutional rights, obtained meaningful counsel from friend who was law enforcement officer and who advised him to cooperate with government agents and made confession after being so counseled, confession was not fruit of illegal arrest and was admissible.

8. Infants ⇐69

Trial court's failure to state explicitly that defendant would not benefit from sentencing under Youth Corrections Act did not constitute error where record established that court fully considered whether defendant would benefit from sentencing under Act. 18 U.S.C.A. § 5005 et seq.

9. Criminal Law ⇐719(3)

It is improper for counsel to express his personal opinion or to state facts of his own knowledge not in evidence and not part of evidence to be presented. ABA Code of Professional Responsibility, DR7–106(c)(1, 3, 4, 7).

10. Criminal Law ⇐719(1), 720(5)

Prosecutor has duty to be scrupulous in his argument and avoid all efforts to obtain a conviction by going beyond evidence before jury or by putting sanction of his office behind testimony of witnesses. ABA Code of Professional Responsibility, DR7–106(c)(1, 3, 4, 7).

11. Criminal Law ⇐719(3)

Prosecutor's expression of personal belief may be tolerated if it is based solely on evidence introduced and jury is not led to believe that other evidence, unavailable to them, justified the belief.

12. Criminal Law ⇐720½

Prosecutor may state, "I believe that the evidence has shown defendant's guilt" but not "I believe that defendant is guilty."

13. Criminal Law ⇐730(7)

Court's jury instruction may be considered as a factor in assessing degree of prejudice arising from prosecutor's giving of personal opinion.

14. Criminal Law ⇐719(3)

In assessing prejudicial impact of prosecutor's comments expressing his opinion, court will consider strength of evidence against each defendant who might have been prejudiced.

15. Criminal Law ⇐719(3)

Prosecutor's statement that he thought the evidence was overwhelming and that he thought jury could reach only conclusion of guilt and that defendant confessed because he was guilty of serious crime and was not a hardened criminal did not prejudice defendant with respect to charge of conspiracy to import marijuana where evidence against defendant who confessed was overwhelming, prosecutor's expressions of personal belief referred to evidence or conclusions drawn from it and prosecu-

tor's conjecture was at least partially favorable in that it cast defendant as remorseful and not hardened criminal. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 1002, 1013, 21 U.S.C.A. §§ 952, 963.

16. Criminal Law ⇐1171.3

Prosecutor's remarks that he thought evidence against defendants was overwhelming and that he thought jury would have to reach only conclusion of guilt did not prejudice defendants in that statements were not specifically directed at either of them and case against two defendants was overwhelming.

17. Criminal Law ⇐1144.13(3)

In reviewing sufficiency of evidence to support a conviction, evidence must be viewed in light most favorable to government.

18. Conspiracy ⇐47(1)

There must be proof beyond reasonable doubt that a conspiracy existed, that accused knew it and, with that knowledge, voluntarily joined it.

19. Conspiracy ⇐43(12)

There is no need to allege or prove overt act in a conspiracy prosecution under sections governing attempt and conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

20. Conspiracy ⇐47(12)

Evidence in drug conspiracy was sufficient to prove an agreement to distribute by defendants who imported marijuana in large quantities. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846.

21. Conspiracy ⇐40.1

Mere association with other persons involved in criminal enterprise is insufficient to prove participation in a conspiracy.

22. Conspiracy ⇐40

Proximity to crime or even actual presence at scene of crime is not sufficient to prove participation in a conspiracy.

23. Conspiracy ⇐40.1

Mere knowledge, acquiescence or approval without cooperation or agreement to cooperate is not enough to constitute one a party to a conspiracy.

24. Conspiracy ⇐47(12)

Defendant's knowledge of conspiracy and presence at meetings relative to conspiracy, taken together with his statements relative to carrying out of conspiracy and money to be realized from drug transaction was sufficient to connect defendant with conspiracy to import marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002, 21 U.S.C.A. § 952.

25. Criminal Law ⇐1171.3

Prosecutor's erroneous statement placing defendant at key meeting relative to conspiracy to import marijuana was harmless error where there was indisputable evidence that defendant was connected with the conspiracy and that he attended other key meetings. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002, 21 U.S.C.A. § 952.

26. Criminal Law ⇐720(1)

Prosecutor's expression of opinion as to weight of evidence was not an endorsement of his case.

27. Drugs and Narcotics ⇐73

Very size of a narcotics cache can be sufficient to show intent to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, 21 U.S.C.A. § 841.

28. Conspiracy ⇐47(12)

Although there was no direct evidence that defendants planned to distribute marijuana in the United States, where evidence showed plan to import 1,100 50-pound bales of marijuana and use of vans to transport marijuana and that conspirators were short on "front money," evidence was sufficient to establish a conspiracy to distribute. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846.

29. Criminal Law ⇐805(3)

Trial court in marijuana distribution prosecution erred when it used word "into" in instruction that distribution meant transferring "into" the United States some or all of article to another individual while in the United States. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, 21 U.S.C.A. § 841.

30. Criminal Law ⇐1162

In determining whether erroneous instruction and other errors required reversal, court had to determine whether errors might have contributed to verdict that was reached.

31. Criminal Law ⇐1172.1(5)

Erroneous instruction that distribution means transferring "into" the United States was not unduly prejudicial to two defendants where subsequent correct definition was given and where evidence against defendants as to their participation in conspiracy to distribute marijuana was overwhelming. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, 21 U.S.C.A. § 841.

32. Conspiracy ⇐47(12)

Direct and circumstantial evidence that two defendants were peripheral participants in scheme to import marijuana did not refute, beyond reasonable doubt, hypothesis that they had no knowledge of a conspiracy to distribute once marijuana reached shores of United States. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 1002, 1013, 21 U.S.C.A. §§ 841, 846, 952, 953.

33. Conspiracy ⇐40.1

One who knows of a conspiracy and intentionally acts in furtherance of it is culpable as a conspirator.

34. Conspiracy ⇐47(12)

Although defendants who contributed to scheme to import marijuana could be charged with knowledge that scheme to distribute would likely be formed once marijuana arrived in United States, that was not sufficient to exclude, beyond reasonable doubt, the hypothesis that they did not then join in the conspiracy to distribute or even know of it. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 1002, 1013, 21 U.S.C.A. §§ 841, 846, 952, 953.

35. Conspiracy ⇐40

Where two defendants were peripheral participants in scheme to import marijuana and there was no evidence that they would come into possession of marijuana once it arrived in the United States share in its proceeds thereafter or other evidence that they were privy to plans to distribute marijuana, defendants could not be convicted of conspiracy to distribute marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 1002, 1013, 21 U.S.C.A. §§ 841, 846, 952, 953.

36. Criminal Law ⇐193

Double jeopardy clause precluded retrial of defendants whose conviction of conspiracy to distribute marijuana was overturned.

37. Criminal Law ⇐29

A single act may constitute two offenses if it violates two substantive statutes but, even if a single agreement has more than one unlawful objective, it may not truly constitute two conspiracies.

38. Conspiracy ⇐24

It is agreement that is illegal in a conspiracy; if there is only one agreement, there is but one offense though its objectives are multiple.

39. Criminal Law ⇐29

A single act may cause more than a single consequence; therefore, one act may be prosecuted and punished as more than a single offense.

40. Conspiracy ⇐40.1

Government need prove only that a conspirator agreed to one of many objectives charged to hold him liable for other objectives of agreement.

41. Conspiracy ⇐28(1)

Commission or attempted commission of several offenses constitutes several crimes but one agreement to violate a number of laws remains but one crime if it is charged merely as a conspiracy and not as a substantive offense.

42. Conspiracy ⇐23

There may be two or more agreements in a given case and each may violate different or identical conspiracy statutes.

43. Conspiracy ⇐28(3)

Separate convictions of conspiracy to import marijuana and conspiracy to distribute marijuana would be affirmed notwithstanding contention that there was a single illegal agreement relative to drugs. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 1002, 1013, 21 U.S.C.A. §§ 841, 846, 952, 953.

Appeals from the United States District Court for the Southern District of Florida.

Before SKELTON *, Senior Judge, and FAY and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The appellants challenge their convictions on both counts of a two count indictment charging conspiracy to import marijuana in violation of 21 U.S.C. § 952, and a conspiracy to distribute marijuana in violation of 21 U.S.C. § 841,[1] alleging that some twenty different errors were committed below. Their cavalcade of contentions marches against a background of dramatic events narrated by the government witnesses. A full panorama would be fitting material for a novelist but redundant to this opinion so we recount only so much as appears essential for decision.

I.

During a lengthy intrigue conducted with various of the defendants, a special agent of the Drug Enforcement Administration ("DEA"), Theodore Weed, represented himself as being able to obtain a boat that could unload marijuana from a vessel at sea and transport it to Florida. He was to be paid $200,000 or ten percent of the value of the cargo, which was eventually represented to be 40,000 pounds. He was first approached by the defendant Albernaz. During the course

* Senior Judge of the United States Court of Claims, sitting by designation.

1. Conspiracy to violate § 952 is punishable under 28 U.S.C. § 963. Conspiracy to violate § 841 is punishable under 28 U.S.C. § 846.

of negotiations that ensued, he was introduced to defendants Rodriguez and Smigowski, as Albernaz's principals.

There were many meetings, complicated plans, and many conversations with Albernza and Rodriguez, some of which were tape recorded. Eventually, a place to unload the cargo was located on a Florida key south of Marathon.[2] Plans were made to meet the freighter that would bring the cargo, and Captain Jones, the captain of the Catchalot II, was enlisted. Captain Jones was secretly assisting the government.

Albernaz gave DEA agent McCutcheon and Captain Jones the final instructions, including the coordinates for a rendezvous with the freighter, and codes to be used when communicating with it. Albernaz stated that they were to unload 1,100 bales containing about 50 pounds each, and that there was an option for 300 more bales which could be obtained if a particular message were given the captain of the freighter. The Catchalot II left West Palm Beach the evening of January 27, with a crew secretly composed of DEA agents, Customs agents, and civilians. Albernaz and Rodriguez continued their efforts to arrange for delivery of the valuable cargo.

Two days later, the co-defendant William Martins chartered a Piper Navajo aircraft. Martins, Rodriguez and Albernaz, together with three pilots, flew on the plane from Fort Lauderdale to the Bahamas. Martins told one pilot, Jerry Harvey, that they were searching for a fishing boat which was in trouble. Due to darkness, the rendezvous of the vessels could not be completed, so the plane carrying Martins, Albernaz and Rodriguez returned to Fort Lauderdale. Harvey was paid $900 for the trip.

The next day, Martins again chartered Harvey's aircraft. Harvey flew Martins, Albernaz and Rodriguez over the freighter and the Catchalot II; messages were dropped to each indicating the location of the other vessel. The Catchalot II established itself as the pickup boat via the use of the code disclosed by Albernaz. Captain Jones informed the captain of the freighter that he wanted "to offload" immediately. The captain of the freighter replied that he wanted to wait for dark, but eventually agreed to unload after asserting that he had never "offloaded" in daytime before. The Catchalot II tied up alongside the freighter and 150 bales of marijuana were unloaded pursuant to a careful count by the captain of the freighter and Captain Jones.

Ostensibly to stow the marijuana bales below deck, the Catchalot II moved away from the freighter, and then covertly called the Coast Guard. During the next few hours, the Catchalot II maintained a distance from the freighter. The Coast Guard vessel Dauntless appeared on the scene at approximately 7:00 p. m.

Using both Spanish and English, the Coast Guard vessel ordered the freighter to stop. It did not respond and, after approximately 30 minutes, the Coast Guard fired three short bursts of a machine gun across its bow. It then fired three rounds from a canon. This caused the freighter to stop. Thirteen Colombian seamen aboard the freighter were arrested, and, although separately tried, were charged as co-conspirators with the appellants herein. The appeal from their convictions is separately reported. *United States v. Cadena*, 5 Cir. 1978, slip op. p. 874, —— F.2d ——.

2. The marijuana was transferred 30 miles east of Elbow Cay, outside of Abaco Island in the Bahamas, 200 to 225 miles east of the United States.

About the time these events were occurring, defendants Martins and Rodriguez were arrested in a Miami hotel room, and *Miranda*[3] warnings were given to them. Smigowski and Albernaz were arrested an hour later at the same hotel.

At DEA headquarters, Agent Fernandez discovered that Martins was only 18 and asked him how he got into trouble. In an emotional state, Martins replied that he would give his story but "he had to make a telephone call prior to talking . . . ." Martins' parents had recently died so he called a family friend, Captain Bob Frost of the Hialeah Police Department, and asked his friend whether or not he should cooperate with the federal agents. Captain Frost asked Martins about the circumstances of the arrest; the young defendant indicated that he had gotten into a marijuana deal and that someone had given him $20,000. Captain Frost then advised Martins to cooperate with the agents. Martins became very upset; he said to Captain Frost that, if he did cooperate, he would be killed. After Frost advised Martins, Agent Fernandez got on the phone and promised Frost that, if Martins cooperated, the DEA would provide the Hialeah Police Department with helpful information. Martins then gave a statement that incriminated himself and some of the other defendants.

The defendants were each convicted of a conspiracy to import marijuana, 21 U.S.C. § 952, (Count I) and a conspiracy to distribute marijuana, 21 U.S.C. § 841, (Count II).[4] There was no distinction whatsoever between the allegations in the Count I conspiracy and the Count II conspiracy except that each count cited a different statutory section and a different objective. The overt acts charged and all the other recitals of the indictment in each count were identical. Appellants raise eleven common challenges to their convictions; Martins raises nine additional grounds, and Smigowski separately challenges the sufficiency of the evidence.

II.

Appellants raise an ingenious defense which they call jurisdictional entrapment. They note that, had they conspired to import marijuana from a freighter located in international waters into some country other than the United States, they would not have committed a crime against the United States or be subject to its jurisdiction. They contend that the government induced them to conspire to import the marijuana into, and distribute it within, the United States rather than another country. In addition, appellants raise the related issue that importation into the United States was suggested by the government; therefore, they were enmeshed in a crime fomented by the state. This misconduct, they urge, required their acquittal. *See United States v. Oquendo*, 5 Cir. 1974, 490 F.2d 161, where the court

3. *Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

4. Rodriguez was sentenced to imprisonment for four and one-half years on both counts, the sentences to be served *consecutively*. Albernaz was sentenced to imprisonment for three and one-half years (42 months) on each count, the sentences to be served *consecutively*. Smigowski was sentenced to imprisonment for three years on both counts, the sentences to be served *consecutively*. Martins was sentenced to three years on each count, the sentences to be served *concurrently*. Each was sentenced to a special parole term of two years on each count, to be served consecutively by Rodriguez, Albernaz and Smigowski, and concurrently by Martins.

approved submitting to the jury both the traditional entrapment defense and the different but related entrapment defense discussed in *United States v. Bueno*, 5 Cir. 1971, 447 F.2d 903, *cert. denied*, 1973, 411 U.S. 949, 93 S.Ct. 1931, 36 L.Ed.2d 411.[5]

[1] We need not consider and endorse or disclaim the legal bases on which these contentions are postulated because the factual hypotheses on which they were also based were not established. The trial judge submitted each contention to the jury under an adequate charge,[6] and there was a sufficient evidentiary basis for the jury to conclude, beyond a reasonable doubt, that the defendants were predisposed to import marijuana into the United States, and were neither entrapped into doing so nor enmeshed in crime by federal agents.

[2, 3] Appellants also contend that the charge failed adequately to allocate the burden of proof with respect to the standard entrapment defense. The government has the "ultimate burden [of] proving beyond reasonable doubt that predisposition and not inducement was the cause of the crime." *United States v. Tate*, 5 Cir. 1977, 554 F.2d 1341, 1344; *United States v. Groessel*, 5 Cir. 1971, 440 F.2d 602, 606, *cert. denied*, 1971, 403 U.S. 933, 91 S.Ct. 2263, 29 L.Ed.2d 713. At the point where the court discussed entrapment, it did not specifically describe the allocation of proof. However, it properly indicated that a reasonable doubt as to inducement required acquittal.[7] The jury was instructed that the general burden of proof beyond reasonable doubt was on the government, and it was evident from the charge as a whole that this allocation governed the entrapment defense. This court has approved similar instructions. *United States v. Banks*, 5 Cir. 1973, 475 F.2d 1367, 1369; *see also United States v. Groessel, supra*, 440 F.2d at 607.

III.

The trial court also included in the charge to the jury the following statement with respect to the general reasonable doubt standard:

5. In *Bueno*, this court held that entrapment is established as a matter of law whenever the contraband in question is supplied to the defendant by a government agent, even where the defendant is predisposed. *Bueno* was effectively overruled by *Hampton v. United States*, 1976, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113.

6. Appellants complain that the court did not instruct that jurisdictional entrapment could occur if they had a predisposition to commit crimes only against other countries. Even if predisposition must contemplate a particular jurisdiction, this was adequately explained in the charge which provided in relevant part:

> In the event the evidence establish[es] that the government induced the defendant to import and/or distribute the marijuana into the United States, as opposed to some other jurisdiction or country, then the defense of entrapment will lie.

7. The charge read:

> If you, the jury, should find beyond a reasonable doubt from the evidence in the case that before anything at all occurred respecting the alleged offense involved in this case, the defendants were ready and willing to commit the crimes, such as charged in the indictment, whenever the opportunity was afforded and that the Government officer or their agent did no more than offer the opportunity, then the jury should find that defendants are not victims of entrapment.
>
> On the other hand, if the evidence should leave you with reasonable doubt as to whether the defendants had the previous intent or purpose to commit any offense of the character charged and did so only because they were induced or persuaded by some officer or agent of the Government, then it is your duty to acquit them.

> A reasonable doubt means a doubt that is based on reason and common sense. Such doubt must be substantial rather than speculative.

In *United States v. Alvero*, 5 Cir. 1972, 470 F.2d 981, 982–983, this court reversed a conviction because the court charged:

> "It is not a speculative doubt, but any substantial reasonable doubt, common, ordinary horsesense doubt . . . a *very* substantial doubt, let me put it that way, of the guilt of the defendant."

(Emphasis added.)

However, in *United States v. Turk*, 5 Cir. 1976, 526 F.2d 654, 669, *cert. denied*, 1976, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84, and in *United States v. Muckenstrum*, 5 Cir. 1975, 515 F.2d 568, 570, *cert. denied*, 1975, 423 U.S. 1032, 96 S.Ct. 564, 46 L.Ed.2d 406, we sustained a verdict despite our express disapproval of a charge stating:

> Such doubt must be substantial rather than speculative, that is, a defendant is never to be convicted on mere suspicion or conjecture.

[4] It certainly would have been better for the charge to be given in other terms. *But cf.* LaBuy, Jury Instructions in Federal Criminal Cases § 6.01–3. There is no want of jurisprudence with respect to how the reasonable doubt standard may be explained. *See* discussions in *In re Winship*, 1970, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368; *Holland v. United States*, 10 Cir. 1954, 209 F.2d 516, 522–523, *aff'd*, 1954, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150. Little new can, or should, be added after 200 years of judicial use of the same term. But the charge given is sufficiently akin to the ones permitted in *Turk* and *Muckenstrum*, where substantial doubt was employed to contrast speculation, to warrant affirmation. Unlike the charge in *Alvero*, it does not directly equate reasonable doubt with "very substantial doubt" or even with a "substantial doubt" by use of an introductory phrase such as, "let me put it th[is] way."

We note that the Seventh Circuit Court of Appeals has wrestled with the equation of reasonable doubt with substantial doubt on a number of occasions, and, although it expressly disapproved the formulation, it has not yet found reversible error. *United States v. Crouch*, 7 Cir. 1976, 528 F.2d 625, 630, 631, *cert. denied*, 1976, 429 U.S. 900, 97 S.Ct. 267, 50 L.Ed.2d 184; *United States v. Shaffner*, 7 Cir. 1975, 524 F.2d 1021, 1023, note 2, *cert. denied*, 1976, 424 U.S. 920, 96 S.Ct. 1126, 47 L.Ed.2d 327; *United States v. Lawson*, 7 Cir. 1974, 507 F.2d 433, 440, *cert. denied*, 1975, 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 762. *Compare United States v. Bridges*, 7 Cir. 1974, 499 F.2d 179, 185–186, *cert. denied*, 1974, 419 U.S. 1010, 95 S.Ct. 330, 42 L.Ed.2d 284. Most recently the Supreme Court noted, "this definition, though perhaps not in itself reversible error, often has been criticized as confusing." *Taylor v. Kentucky*, 1978, —— U.S. ——, ——, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468. Additionally, other courts of appeals have considered similar equations and decided in the context of each particular case that a new trial was not required. *United States v. Magnano*, 2 Cir. 1976, 543 F.2d 431, 437, *cert. denied*, 1977, 429 U.S. 1091, 97 S.Ct. 1101, 51 L.Ed.2d 536; *United States v. Fallen*, 8 Cir. 1974, 498 F.2d 172, 177; *United States v. Christy*, 6 Cir. 1971, 444 F.2d 448, 450–451, *cert. denied*, 1971, 404 U.S. 949, 92 S.Ct. 293, 30 L.Ed.2d 266; *United States v. Aiken*, 2 Cir. 1967, 373 F.2d 294, 299, *cert. denied*, 1967, 389 U.S. 833, 88 S.Ct. 32, 19 L.Ed.2d 93. *See also United States v.*

Gratton, 7 Cir. 1975, 525 F.2d 1161, 1162, and *United States v. Atkins*, 8 Cir. 1973, 487 F.2d 257, 260, where the courts found similar instructions were not plain error in the absence of a Rule 30, Fed.R. Crim.Proc. objection. A timely objection was made here.

[5] In reviewing "reasonable doubt" charges, we look to the whole instruction rather than isolate any particular sentence. *United States v. Patman*, 5 Cir. 1977, 557 F.2d 1181; *United States v. Steinkoenig*, 5 Cir. 1973, 487 F.2d 225; *Russell v. United States*, 5 Cir. 1970, 429 F.2d 237; *Baker v. United States*, 5 Cir. 1969, 412 F.2d 1069, *cert. denied*, 1970, 396 U.S. 1018, 90 S.Ct. 583, 24 L.Ed.2d 509; *Tillery v. United States*, 5 Cir. 1968, 396 F.2d 790. When viewed contextually, the reference does not constitute reversible error. However, we underscore the gravity of misstating this "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law,'" *In re Winship*, 1970, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368, citing *Coffin v. United States*, 1895, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481, and join the Seventh Circuit in admonishing "that a district court giving a reasonable doubt instruction containing the challenged equation notwithstanding a Rule 30 challenge can reasonably expect a reversal. We would assume further that district courts in view of the expressed dissatisfaction by this court [in *Muckenstrum, Turk, Alvero* and now here] with the language would *sua sponte* eliminate the phrase from their set of standard instructions even in the absence of a Rule 30 objection." *United States v. Wright*, 7 Cir. 1976, 542 F.2d 975, 988.

IV.

Because of its significance with respect to discussions that follow, we turn aside to consider the issues raised by the appellant Martins concerning the admissibility of his confession. It is contended that this should be suppressed as the fruit of an illegal arrest. *See Wong Sun v. United States*, 1963, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441.

[6] At the time of Martins' arrest, the agents had no knowledge that he was connected with the conspiracy although they had seen his name on the passenger manifest of the chartered aircraft and were, of course, aware that he was in the room with Rodriguez the night of the arrest. They did not have probable cause to arrest him.

Hence, we must consider whether the confession that followed his arrest was "come at by exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun, supra*, 371 U.S. at 488, 83 S.Ct. at 417. In *Brown v. Illinois*, 1975, 422 U.S. 590, 603–04, 95 S.Ct. 2254, 2261–62, 45 L.Ed.2d 416, the factors to be considered in this determination were explained:

> The *Miranda* warnings are an important factor . . . in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct are all relevant . . . the burden . . . rests, of course, on the prosecution.

(Footnotes omitted.) *See also United States v. Ceccolini*, 1978, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268.

[7] *Miranda* warnings were given to Martins although he refused to sign a form affirming this. *See United States v. Hopkins*, 5 Cir. 1970, 433 F.2d 1041, *cert. denied*, 1971, 401 U.S. 1013, 91 S.Ct. 1252, 28 L.Ed.2d 550. The confession did not actually occur until Martins was transported to DEA offices and after he had the benefit of the intervening advice of Captain Frost; while Frost is not an attorney, Martins was able to obtain meaningful counsel from him. Frost was consulted as, and acted as, a friend, not as a law enforcement official. The offer of helpful information to Frost in exchange for Martins' cooperation came after Frost's advice and did not affect it. The record indicates that Martins knowingly and voluntarily waived his rights to silence and assistance of counsel by insisting that he wanted to tell his story. Finally, the government's conduct was not flagrant or reprehensible. Therefore, the court below did not err in denying the motion to suppress.

[8] The only other error raised by Martins alone that warrants comment is the failure of the sentencing court explicitly to find that Martins would not benefit from sentencing pursuant to the Federal Youth Corrections Act, 18 U.S.C. § 5005, *et seq.* At sentencing, Martins' attorney expressly waived sentencing under the Act after discussing the benefits of it with the court. The record is convincing that, although the court did not recite any talismanic phrases, it did fully consider whether the defendant would benefit from sentencing under the Act. *Bustillo v. United States*, 5 Cir. 1978, 573 F.2d 368; *Mitchell v. United States*, 5 Cir. 1977, 547 F.2d 875; *United States v. Brown*, 5 Cir. 1975, 522 F.2d 207; *United States v. Gamboa-Cano*, 5 Cir. 1975, 510 F.2d 598. *See also Dorszynski v. United States*, 1974, 418 U.S. 424, 444, 94 S.Ct. 3042, 3053, 41 L.Ed.2d 855.

V.

Appellants complain of alleged misstatements of facts by the prosecutor to the jury and of his expression of personal opinion with respect to the defendants' guilt. In the course of a lengthy argument occupying 20 pages in the transcript, the prosecutor made the following challenged statements:

1) One "Banello," who had been characterized in the testimony as an organized crime figure, was found in the room with Martins and Rodriguez at the time of the arrest. There was no evidentiary basis for this statement.

2) Smigowski was at a key meeting, contrary to the testimony as to who attended the meeting.

3) "Smigowski made some comment about the lights [at one suggested unloaded spot], because he was also concerned about having too much light at night and that it would not be really clever to try a smuggling operation if you are bathed in light. And, of course, he wanted it dark." The only relevant testimony was, "Smigowski asked about the lights, and the brightness of the lights."[8]

4) "Once [the marijuana] arrived in South Florida it would then be trucked to New England and that is why the indictment is in the form of two different counts . . . . One, it would be imported, and it would then be distributed throughout New England." There

8. When asked if Smigowski said anything else, Agent Weed testified, "no more than just about the lights."

was no evidence that the marijuana would be distributed throughout, or in, New England or that it would be transported there.

5) "The evidence against those defendants *I think* is just overwhelming . ." and "*I think* you will have to reach . . only one conclusion, that they are guilty of two counts . . ." (Emphasis added.)

6) "But if you are guilty of a [serious crime] . . . and you are not some kind of hardened criminal or something . . . you would confess . . . And *I think* that is what Willie Martins did."

[9, 10] "It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of the evidence to be presented," *Dunn v. United States*, 5 Cir. 1962, 307 F.2d 883, 885–886. *See also Berger v. United States*, 1935, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314; *United States v. Morris*, 5 Cir. 1978, 568 F.2d 396, 400–02; *United States v. Pariente*, 5 Cir. 1977, 558 F.2d 1186; *United States v. Corona*, 5 Cir. 1977, 551 F.2d 1386; *United States v. Warren*, 5 Cir. 1977, 550 F.2d 219, 229; Code of Prof. Resp., DR 7–106(C)(1), (3)(4), and (7); ABA Standards, The Prosecution Function, §§ 5.8 and 5.9. This rule imposes a duty on the prosecutor to be scrupulous in his argument and to avoid all efforts to obtain a conviction by going beyond the evidence before the jury or by putting the sanction of his office behind the testimony of witnesses. But it does not require a mistrial for every erroneous statement or expression of opinion.

[11] A prosecutor's expression of personal belief may be tolerated if it is based solely on the evidence introduced and the jury is not led to believe that other evidence, unavailable to them, justified the belief. *United States v. Morris, supra; United States v. Dawson*, 5 Cir. 1978, 486 F.2d 1326, 1330–1331; *United States v. Martinez*, 5 Cir. 1972, 466 F.2d 679, 683, *cert. denied sub. nom.*, 1973, 414 U.S. 1065, 94 S.Ct. 571, 38 L.Ed.2d 469; *cf. United States v. Diharce-Estrada*, 5 Cir. 1976, 526 F.2d 637, 641–642.

[12] Hence, he may state, "I believe that the evidence has shown the defendant's guilt," but not, "I believe that the defendant is guilty." *United States v. Morris, supra*, 568 F.2d at 402. The expressions of personal belief here expressly referred to the evidence or to conclusions to be drawn from it. Nor did the prosecutor's conjecture regarding Martins amount to a statement of personal belief in his guilt. Indeed it was at least partially favorable insofar as it cast this defendant as remorseful and not a hardened criminal. *Cf. United States v. Corona*, 5 Cir. 1977, 551 F.2d 1386; *United States v. Warren, supra*, 550 F.2d at 219, 229; *United States v. Dunn, supra; Gradsky v. United States*, 5 Cir. 1967, 373 F.2d 706, 710.

[13] Further, the court gave an instruction to disregard any personal opinion of the prosecutor. We have stated:

> In every case involving improper argument of counsel, we are confronted with relativity and the degree to which such conduct may have affected the substantial rights of the defendant . . . one "cannot unring a bell"; "after the thrust of the saber it is difficult to say forget the wound"; and finally, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it".

Dunn v. United States, supra, 307 F.2d at 886. The court's jury instruction may be considered as a factor in assessing the

degree of prejudice. *United States v. Martinez, supra; see also United States v. Crane*, 5 Cir. 1971, 445 F.2d 509, 520.

[14] In assessing the prejudicial impact of such assertions, we must also consider the strength of the evidence against each defendant who might have been prejudiced. *Berger v. United States, supra*, 295 U.S. at 89, 55 S.Ct. at 633; *United States v. Warren, supra*, 550 F.2d 219, 229. "[I]n close cases improper remarks by the prosecuting attorney may carry 'much weight against the accused when they should properly carry none.'" *United States v. Diharce-Estrada*, 5 Cir. 1976, 526 F.2d 637, 642. In this regard, the prosecution itself conceded, and we agree, that the evidence against Martins was "somewhat different" than the others; absent his confession, it is doubtful that it would have withstood a motion for a directed verdict of acquittal. With Martins' confession in evidence, however, the case against him with respect to participation in the conspiracy to import was overwhelming.

[15] Considering the case as a whole, we conclude that these statements did not prejudice the substantial rights of Martins with respect to Count I; the evidence against him was so strong that the same verdict would have resulted had they not been made. We delay consideration of the evidence against Martins with respect to Count II. Likewise, we postpone consideration of the sufficiency of the evidence with respect to Smigowski as to both counts so that the cumulative impact of the various errors he complains of may be assessed with respect to the sufficiency of the evidence against him.

[16] Obviously Albernaz and Rodriguez were not prejudiced with respect to either count. None of the statements was specifically directed at either of them and the case against these two defendants was likewise overwhelming.

VI.

[17] The standard for reviewing the sufficiency of the evidence in criminal cases has repeatedly been stated by this court:

> [I]f the trial or appellate court is satisfied that the jury could not reasonably conclude that the evidence fails to exclude every reasonable hypothesis but that of guilt then the trial court, or on appeal, this Court must hold that "the jury must necessarily have had a reasonable doubt as to the inconsistency."

United States v. Caro, 5 Cir. 1978, 569 F.2d 411, 416, quoting from *United States v. Haggins*, 5 Cir. 1977, 545 F.2d 1009, 1012. *See also United States v. Pinner*, 5 Cir. 1977, 561 F.2d 1203, 1207; *United States v. Nazien*, 5 Cir. 1974, 504 F.2d 394, 395, *cert. denied*, 1975, 420 U.S. 964, 95 S.Ct. 1358, 43 L.Ed.2d 443. The evidence must be viewed in the light most favorable to the government. *Glasser v. United States*, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680.

[18] "[T]here must be proof beyond a reasonable doubt that a conspiracy existed, that the accused knew it and, with that knowledge, voluntarily joined it." *United States v. White*, 5 Cir. 1978, 569 F.2d 263, 267; *United States v. Caro, supra; United States v. Gutierrez*, 5 Cir. 1977, 559 F.2d 1278, 1280; *United States v. Bright*, 5 Cir. 1977, 550 F.2d 240; *see also United States v. Barrera*, 5 Cir. 1977, 547 F.2d 1250.

[19, 20] In a conspiracy under 21 U.S.C. § 846 or 21 U.S.C. § 963, there is no need to allege or prove overt acts. *United States v. White*, 5 Cir. 1978, 569 F.2d 263, 266; *United States v. Thomas*,

5 Cir. 1978, 567 F.2d 638, 641; *United States v. Palacios*, 5 Cir. 1977, 556 F.2d 1359, 1364, note 9. Although as this court has emphasized, "[p]roof of an agreement to enter into a conspiracy is not to be lightly inferred," *United States v. White, supra*, 569 F.2d at 267, quoting *United States v. Johnson*, 5 Cir. 1971, 439 F.2d 885, 888, *cert. denied*, 1971, 404 U.S. 880, 92 S.Ct. 213, 30 L.Ed.2d 161, there was sufficient evidence from which an agreement to distribute could reasonably be inferred.

With respect to Smigowski's presence at various meetings, the government relies upon the three statements that he made:

1) When the conspirators planned to use a marina as a site to unload the Catchalot II, he asked about the lights there, and, as a result, they moved to a darker spot;

2) After Weed's group had agreed to arrangements whereby they would keep a ton of marijuana, he commented that it was worth $500,000 and, therefore, they would not lose money, which may have been an attempt to reassure the agents; and,

3) He told Agent Weed, when asked, that Rodriguez and Albernaz were out at sea coordinating the rendezvous and, therefore, Weed did not have to do it. Additionally, when asked to be introduced to the principals of his organization by Weed, Rodriguez arranged a meeting at which Smigowski was present.[9]

[21–23] "[M]ere association with other persons involved in criminal enterprise is insufficient to prove participation in a conspiracy." *United States v. Barrera, supra*, 547 F.2d at 1257, and cases cited therein. Proximity to the crime or even actual presence at the scene of the crime is not sufficient. *Id.*, 547 F.2d at 1256, and cases cited therein. *See also Gutierrez, supra*, 559 F.2d at 1280–1281; *Caro, supra*, 569 F.2d at 418. *See also United States v. Duckett*, 5 Cir. 1977, 550 F.2d 1027. "[M]ere knowledge, acquiescence or approval without cooperation or agreement to cooperate is not enough to constitute one a part to a conspiracy." *United States v. Mendez*, 5 Cir. 1974, 496 F.2d 128, 130.

[24–26] With respect to the importation scheme (Count I), the jury could conclude beyond a reasonable doubt that Smigowski was more than a sympathetic spectator. It was entitled to infer from the facts presented that Smigowski was a quiet but active member of the conspiracy. His knowledge and presence are not a basis of guilt in themselves, but, taken together with his statements, they provide more than the "slight basis" required to connect him with the conspiracy shown to exist. *United States v. Cadillac Overall Supply Co.*, 5 Cir. 1978, 568 F.2d 1078; *United States v. Bolts*, 5 Cir. 1977, 558 F.2d 316, 324, and cases cited therein. With respect to Smigowski's conviction on Count I, the various errors reviewed in Part V were clearly harmless. At the worst the prosecutor, in summing up, placed Smigowski erroneously at one key meeting; there was indisputable evidence that he attended others. The prosecutor's statements with respect to distribution related only to Count II. The expression of opinion as to the weight of the evidence was not an endorsement of his case by the prosecution. *United States v. Morris, supra*.

9. Although this might constitute hearsay that would not be admissible through the co-conspirator exception without independent proof of a conspiracy, it was not objected to at trial.

[27] There is little direct evidence with respect to a conspiracy to distribute the marijuana after it was imported. There was mention of the use of Winnebagos to transport the marijuana, and Rodriguez indicated that his group was short on "front money" from which it might be inferred that there would be a subsequent sale. The load consisted of approximately 1100 fifty-pound bales, far more than the appellants could personally consume in the course of many lifetimes of furious effort. The very size of a narcotics cache can be sufficient to show intent to distribute under Section 841. *United States v. Perry*, 5 Cir. 1973, 480 F.2d 147 (188 pounds of hashish); *United States v. Mather*, 5 Cir. 1972, 465 F.2d 1035, *cert. denied*, 1972, 409 U.S. 1085, 93 S.Ct. 685, 34 L.Ed.2d 672 (197.75 grams of cocaine); *United States v. Rodriguez*, S.D.Tex.1974, 375 F.Supp. 589, *aff'd*, 5 Cir. 1974, 497 F.2d 172 (376 pounds of marijuana). *Cf.* cases finding amount too small to infer intent to distribute; *Turner v. United States*, 1970, 396 U.S. 398, 423, 90 S.Ct. 642, 655–56, 24 L.Ed.2d 610 (less than one gram cocaine); *United States v. Olvera*, 5 Cir. 1975, 523 F.2d 1252 (two grams cocaine).

[28, 29] Although there was no direct evidence that Albernaz and Rodriguez planned to distribute the marijuana in the United States, this inference might reasonably be drawn from the plan to import it and from the additional evidence concerning them to which we have just referred. If its ultimate destination were, for example, Canada, it is hard to imagine why the appellants would risk bringing it into American borders. In this regard, we must consider the instruction with respect to the definition of distribution:

> Distribution means, with respect of any article, transferring *into* the United States some or all of that article to another individual while in the United States.

(Emphasis supplied.) As the italicized word emphasizes, this instruction was erroneous; while the error may have resulted from a slip of the tongue or from inadvertence, it acquires significance in the light of the nature of the two counts and the poverty of evidence, at least as to some of the defendants, concerning what they knew about the destination and disposition of the smuggled cargo.

Before the charge was given, the government stated for the record that it thought the charge did confuse distribution with smuggling; counsel and the court agreed that the charge would be changed by substituting "while within the United States" for "into," but the court, apparently inadvertently, neglected to make the actual correction. Indeed, in other parts of the instruction, the court correctly stated the law:

> In Count II, the defendants are accused of conspiring to distribute a controlled substance in the United States while within the United States.

And:

> Count II alleges that during the same period, the defendants and other alleged conspirators knowingly and willfully conspired to distribute 30 tons of marijuana in the United States while within the United States.

[30] In determining whether this and other errors require reversal, we must determine whether these errors might have contributed to the verdict that was reached, *United States v. Arias-Diaz*, 5 Cir. 1974, 497 F.2d 165, *cert. denied sub. nom.*, 1975, 420 U.S. 1003, 95 S.Ct. 1445, 43 L.Ed.2d 761; *Addison v. United States*, 5 Cir. 1963, 317 F.2d 808, *cert. denied*, 1964, 376 U.S. 905, 84 S.Ct. 658,

11 L.Ed.2d 605, considering the weight of the evidence pointing to conviction. *United States v. Kilrain*, 5 Cir. 1978, 566 F.2d 979; *Chapman v. United States*, 5 Cir. 1977, 547 F.2d 1240, 1250, *cert. denied*, 1977, 431 U.S. 908, 97 S.Ct. 1705, 52 L.Ed.2d 393; *United States v. Demchak*, 5 Cir. 1977, 545 F.2d 1029; *Null v. Wainwright*, 5 Cir. 1975, 508 F.2d 340, *cert. denied*, 1975, 421 U.S. 970, 95 S.Ct. 1964, 44 L.Ed.2d 459; *Loftis v. Beto*, 5 Cir. 1971, 450 F.2d 599; *Lewis v. United States*, 5 Cir. 1967, 375 F.2d 772.

[31] The distribution instruction was not unduly prejudicial to Rodriguez, and Albernaz; the evidence against them was overwhelming albeit indirect, and the impact of the mistake was lessened by the subsequent correct definition of the law. *See United States v. Wilkinson*, 5 Cir. 1972, 460 F.2d 725.

[32] However, there was literally no evidence with respect to the involvement of Martins and Smigowski in a distribution scheme except what might be inferred from their participation in an agreement to import it. The direct and circumstantial evidence that they were peripheral participants in the importation scheme does not refute, beyond a reasonable doubt, the hypothesis that they had no knowledge of a conspiracy to distribute once it reached these shores.

Unlike Rodriguez and Albernaz, who perforce had to make some arrangements to dispose of their treasure, Smigowski and Martins could each receive his reward and be done with the scheme. Unlike Rodriguez and Albernaz, who, according to the evidence, had contacts outside the Miami area, needed front money, and planned to use Winnebagos, Smigowski or Martins were not shown to have been connected with the actual arrangements for importation.

There was evidence that Smigowski and Martins were parties to the importation scheme, but there is no evidence that would establish beyond reasonable doubt that they would likely come in possession of the haul once it arrived, share in its proceeds thereafter, or other evidence from which it could in turn be inferred that they were privy to plans to distribute the contraband. We have already noted that possession of a large supply of a prohibited substance may justify the inference that the possessor intended to distribute it, but there was no evidence that Smigowski and Martins had sufficient dominion over or interest in the marijuana to warrant the inference.

[33, 34] It is well established that one who knows of a conspiracy and intentionally acts in furtherance of it, is culpable as a conspirator *Direct Sales Co. v. United States*, 1943, 319 U.S. 703, 63 S.Ct. 1265, 87 L.Ed. 1674; *United States v. Becker*, 5 Cir. 1978, 569 F.2d 951. But there is no evidence whatever that, at the time of Martins' and Smigowski's contribution to the importation scheme, they knew that a conspiracy to distribute had been formed. Although they may be charged with knowledge that such a scheme would likely be formed once the haul arrived, this is not sufficient to exclude, beyond reasonable doubt, the hypothesis that they did not then either join in it or even know of it.

[35, 36] Although the inference to be drawn against either Smigowski or Martins or both is a reasonable one, the proof of guilt as to each of them with respect to Count II was insufficient to meet the reasonable doubt standard. Hence, their retrial on that count is precluded by the double jeopardy clause. *Burks v. United States*, 1978, —— U.S.

——, 98 S.Ct. 2141, 57 L.Ed.2d 1. Accordingly, we find sufficient evidence to warrant Smigowski's and Martins' convictions on Count I but must dismiss Count II of the indictment with respect to each of them.

VII.

Finally, all appellants contend that the two counts of conspiracy charged in the indictment were but "one offense," and that, therefore, the imposition of consecutive sentences violates the double jeopardy clause.

This court considered the issue whether violations of 21 U.S.C. § 846 and § 963[10] constitute but one offense in *United States v. Houltin*, 5 Cir. 1976, 525 F.2d 943, and decided that, even if there "was only one conspiracy . . . Congress may choose to punish two aspects of that behavior without contradicting the Double Jeopardy Clause." 525 F.2d at 950. That decision was vacated, *sub nom. Croucher v. United States*, 1977, 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745.[11] Were we free to consider that problem anew, we would conclude, contrary to the conclusion in *Houltin*, that the double jeopardy clause prohibits the punishment of a single conspiracy by more than one penalty. However, the reasoning of *Houltin* has been adopted by two panels of this court. *United States v. Dyar*, 5 Cir. 1978, 574 F.2d 1385, at 1389; *United States v. Smith*, 5 Cir. 1978, 574 F.2d 308. Although the statements with respect to this issue in both of these cases may be distinguished as obiter dictum,[12] they express the views of a number of members of this court.[13] Under these circumstances, we believe that we are required to treat these decisions as binding, set forth the reasons for our disagreement with them, and permit the parties to petition this court for a rehearing *en banc*.

In *United States v. Adcock*, 6 Cir. 1973, 487 F.2d 637, and *United States v. Honneus*, 1 Cir. 1974, 508 F.2d 566, *cert. denied*, 1975, 421 U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101, the courts considered the very conspiracy statutes charged here, 21

10. *See* note 1, *supra*.

11. After the Supreme Court vacated *Houltin* for reconsideration with respect to whether a compelling federal interest would be served by both convictions, this court accepted the government's decision to withdraw the charge of conspiracy to possess (Count II), and its decision not to withdraw the charge with respect to conspiracy to import (Count I) was not challenged. *United States v. Houltin*, 5 Cir. 1977, 553 F.2d 991 (*Houltin II*). We stated in *Houltin II*, "In all other respects this Court's judgment and that of the district court are reaffirmed." But because there was only one conviction remaining, the court could not be reaffirming that portion of *Houltin I* that addressed the double jeopardy issue. A vacated judgment is not binding. *See* 1B Moore's Federal Practice § 0.416[2] (1974).

We note also that counsel in *United States v. Herrera-Vinagas*, 5 Cir. 1978, 573 F.2d 1308, raised the double jeopardy issue with respect to these same statutes, but the court did not address the issue in its unpublished per curiam affirmance.

12. In *Smith*, two separate conspiracies were charged and proved: one for violation of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961, *et seq.*, and one for conspiracy to distribute marijuana, 21 U.S.C. § 846. The court specifically stated, "A cursory examination of the offenses involved here reveals that they are not the same," and that each involved separate elements. 574 F.2d at 310. In *Dyar*, concurrent sentences were imposed, hence it was not necessary to consider the issue.

13. Although *Smith* was a per curiam opinion, court records reveal that it was authored by Judge Fay. As a concurring member of this panel, Judge Fay has authorized me to state that, upon reflection, he is of the opinion that the view adopted here is a preferable one.

U.S.C. §§ 846 and 963, and concluded that, although each concerns different illegal objectives, where a single agreement violates both statutes, the defendants have engaged only in one conspiracy and may be punished only once. See also *United States v. Mori*, 5 Cir. 1971, 444 F.2d 240, 241–245, *cert. denied*, 1971, 404 U.S. 913, 92 S.Ct. 238, 30 L.Ed.2d 187, where this court held that, under the facts, an agreement to import a narcotic drug and an agreement to travel in foreign commerce to promote unlawful activity were but one conspiracy and sentence must be imposed on only one count.

These conclusions all rely upon *Braverman v. United States*, 1942, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23, in which the court held that, when a single agreement is made, "[t]he one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." *Id.*, 317 U.S. at 53, 63 S.Ct. at 102. This is true "however diverse its objects." *Frohwerk v. United States*, 1919, 249 U.S. 204, 210, 39 S.Ct. 249, 252, 63 L.Ed. 561. The court in *Honneus, supra*, recognized that Congress has the power to enact such overlapping statutes and that defendants could simultaneously be prosecuted and convicted under each, for it might be difficult or impossible for the grand jury definitely to determine in advance which set of laws the conspiracy violated if proved; if, however, the defendants were convicted of both, they could be sentenced under only one.

[37–39] The opposite result was reached in *United States v. Marotta*, 9 Cir. 1975, 518 F.2d 681, with respect to these statutes. But, in surveying the jurisprudence, the Ninth Circuit failed to take note of the essential distinction: a single *act* may constitute two offenses if it violates two *substantive* statutes, but, even if a single *agreement* has more than one unlawful objective, it may not truly constitute two *conspiracies*. It is the *agreement* that is illegal in a conspiracy; if there is only one agreement, there is but one offense though its objectives are multiple. However, a single act may cause more than a single consequence; therefore, one act may be prosecuted and punished as more than a single offense. *See Gore v. United States*, 1958, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405, which involved violation of several substantive statutes by one act of sale. *But cf. Simpson v. United States*, 1978, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70. This distinction is drawn in *Braverman* where the court distinguished the case before it (a single conspiracy that appeared to violate two separate statutory provisions) from the case of "a single *act* which violates two statutes," as evidenced by its citation of *Blockburger v. United States*, 1932, 294 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 and *Albrecht v. United States*, 1927, 273 U.S. 1, 47 S.Ct. 250, 71 L.Ed. 505.

A single agreement to rob a bank, kill the guard, steal a car and flee contemplates the possible commission of a number of crimes. But if there is only one agreement, it is the agreement that is the offense; the agreement itself rather than its imagined objectives is the only concrete harm that has occurred. By contrast, a person who fires one bullet and kills two different persons has wrought two distinct social harms, and society may punish both.

Unlike the present case, *Braverman* involved *one* conspiracy statute which made it illegal to conspire to violate a number of substantive laws. Here we are presented with two different conspir-

acy statutes each of which makes it illegal to conspire to a particular end. But this is not an adequate basis for reaching a different result from the one determined in *Braverman*. Here the facts showed that there was but one conspiracy regardless whether its objectives are proscribed by two discrete laws such as 21 U.S.C. §§ 846, 963, or by one law such as former 18 U.S.C. § 88,[14] considered in *Braverman*, which proscribed objectives by reference to other statutes. *Cf.* Developments—Conspiracy, 72 Harv.L.Rev. 920, 964–966; LaFave & Scott, Criminal Law, § 62 at 479–480 (1972). For, as the court said in *Braverman*: "[t]he one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." *Id.*, 317 U.S. at 53, 63 S.Ct. at 102.

The problem was recognized in the careful opinion in *Houltin, supra*, and the court distinguished the situation where it is charged that *one agreement* violates the general conspiracy statute and a specific conspiracy statute (as charged in *Mori, supra*) and the case where there are *two specific* conspiracy statutes. We cannot accept this as a valid distinction. It would permit the Congress to penalize a single *agreement* by a multitude of separate conspiracy statutes so long as they are specific.

[40] This court has found, in other contexts, that but a single conspiracy exists even though the agreement that constitutes it has several objectives and aims at the commission of several offenses. *United States v. Elliott*, 5 Cir. 1978, 571 F.2d 880, 902; *United States v. Bolts, supra*, 558 F.2d at 325. It is for this reason that the government need prove only that a conspirator agreed to one of the many objectives charged to hold him liable for the other objectives of the agreement, *United States v. Bolts, supra*. *See also United States v. Decker*, 5 Cir. 1976, 543 F.2d 1102, *cert. denied sub. nom.*, 1977, 431 U.S. 906, 97 S.Ct. 1700, 52 L.Ed.2d 390.

Our conclusion that only one conspiracy existed is consistent with our finding sufficient evidence that Smigowski and Martins agreed to only one objective, importation, of a multiple objective conspiracy: that does not imply that there was more than one agreement, merely more than one objective. As we stated in *United States v. Elliott, supra*, 571 F.2d at 902, "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is, in either case, that agreement which constitutes the conspiracy which the statute punishes." Quoting *Braverman v. United States, supra*, 317 U.S. at 53, 63 S.Ct. at 102.

Because one conspiracy may have many illegal objectives, it will necessarily involve a number of sub-agreements to commit each of these specified objectives. Some members may concur in only some of the many objectives, yet they are liable for all because there is but one scheme, one enterprise, one conspiratorial web. *See United States v. Becker*, 5 Cir. 1978, 569 F.2d 951, 960–61; *United States v. Baldarrama*, 5 Cir. 1978, 566 F.2d 560, 565–66; *United States v. Bolts, supra*. If each stitch in that web were treated as a separate conspiracy, infinite bases for liability could be confected, *see United States v. Papa*, 2 Cir. 1976, 533 F.2d 815, 820, and cases cited

14. Now 18 U.S.C. § 371.

therein. Here, for example, each conspirator might be charged with 16 separate conspiracies to import or distribute with each of the 16 other conspirators; over 200 conspiracies could be charged. Hence, the conspiracy must be defined as broadly as the reach of vicarious liability.[15]

For example, in a chain conspiracy, the distributor and exporter may have one agreement to import, and the distributor and seller may have another agreement to distribute, yet one conspiracy exists, and the exporter and seller are liable for each other's acts, although they never agreed upon the same objectives. *United States v. Bruno*, 2 Cir. 1939, 105 F.2d 921, 922, *rev'd on other grounds*, 1939, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257; *see United States v. Papa*, 2 Cir. 1976, 533 F.2d 815, 820–821, *cert. denied*, 1976, 429 U.S. 961, 97 S.Ct. 387, 50 L.Ed.2d 329. *See also United States v. Morrow*, 5 Cir. 1976, 537 F.2d 120, 126, *cert. denied sub. nom.*, 430 U.S. 956, 97 S.Ct. 1602, 51 L.Ed.2d 806.

[41] Had the distribution scheme succeeded, Smigowski and Martins could be held vicariously liable for it because it was a related objective of the one conspiracy. If the conspiracy to distribute were a completely separate offense from the conspiracy to import, then, even had the conspiracy to distribute been successful, Smigowski and Martins could not be convicted of participation in it by virtue of the joinder in the agreement to import. In some circumstances, however, that very joinder in an agreement to reach an illicit objective (itself part of the conspiracy to reach a larger but encompassing objective) renders the conspirator liable for objectives he did not himself concur in. *United States v. Bruno, supra*, and progeny. Here, the conspiracy did not succeed; Smigowski and Martins were charged merely with making an agreement that in fact was aborted. Therefore, the evidence was not sufficient to make a jury case on the alleged conspiracy to distribute. The two conspiracies were not separate crimes for double jeopardy purposes because they embraced but one ultimate overall goal. The commission, or even the attempted commission, of several offenses constitutes several crimes, but one *agreement* to violate a number of laws remains but one crime if it is charged merely as a conspiracy and not as a substantive offense.

15. According to one commentator:

> Whether several offenses are the multiple objects of a single agreement or the separate objects of distinct agreements is of considerable importance for purposes of multiple punishment and double jeopardy, since generally there can be only one conspiracy conviction when there has been only one agreement. Assuming, however, that the prosecution is able to show separate agreements to each of the objects, it does not seem that liability for several conspiracies must necessarily follow. When two men who have agreed to commit a rape later agree to commit a burglary, there is a new object dimension and hence strictly speaking a new agreement. If the first crime has been completed, and the parties are no longer united by their adherence to a common undertaking when the second is agreed to, the old grouping dangerous to society has been dissolved, and the new agreement creates a new one . . . But when the second object is agreed to before the attainment of the first, it seems that this new agreement should be disregarded since no new grouping is created by it . . . since the law does not punish separately for the multiple objects of a single agreement, punishment for both agreements in this case tends to place a premium upon foresight in crime.

Developments—Conspiracy, 72 Harv.L.Rev. 920, 930 (1959).

[42] Of course, there may also be two or more agreements in a given case and each may violate different, or identical, conspiracy statutes. *See generally* Note, Resolution of the Multiple Conspiracies Issue Via a "Nature of the Enterprise" Analysis: The Resurrection of Agreement, 42 Brooklyn L.Rev. 243 (1975). Distinguishing between one overall conspiracy and several separate conspiracies is "a frustrating and challenging task." *United States v. Perez*, 5 Cir. 1973, 489 F.2d 51, 57, *cert. denied*, 1974, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664. But there is ample jurisprudence to assist in that task. *See, e. g., United States v. Becker, supra; United States v. Baldarrama, supra; United States v. Morrow, supra; United States v. Perez, supra.* "In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, then it is one conspiracy." *United States v. Perez, supra*, 489 F.2d at 62.

[43] Here some conspirators may have agreed only to the importation and others to importation and distribution, but all were part of a common scheme aimed at moving the marijuana from the fields of Colombia to its consumers. It is no defense to the one conspiracy theory that some conspirators were unaware of the precise role played by others. *United States v. Becker, supra; Blumenthal v. United States*, 1947, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154. As we noted at the outset, Counts I and II are identical except with respect to the alleged objective of the agreement and the statute charged to have been violated. However, we are constrained by *Dyar, supra*, and *Smith, supra*, to conclude that appellants may be punished twice for their agreement; hence we affirm the conviction of appellants Rodriguez and Albernaz with respect to both counts. For reasons stated previously, the convictions of appellants Smigowski and Martin on Count II are reversed and that count of the indictment is ordered dismissed with respect to them.

VIII.

In a separate opinion in *United States v. Cadena*, 5 Cir. 1978, slip op. p. 874, —— F.2d ——, we consider the question whether the evidence seized during the search of the freighter was illegally obtained and was properly admitted. However, this decision does not turn on the conclusion reached there. Assuming arguendo that all evidence obtained aboard the freighter should have been suppressed, there were 150 bales of marijuana aboard the Catchalot II, and other overwhelming evidence against each of the defendants. This conclusion makes it unnecessary for us to determine whether the appellants have standing to challenge the search of the freighter.

Having carefully reviewed the record, we are persuaded that appellants' additional contentions are without merit. Accordingly, the judgment is AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with this opinion.

Affirmed in part, reversed in part and remanded.

United States Court of Appeals
Fifth Circuit

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

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600 CAMP STREET
NEW ORLEANS, LA. 70130

November 28, 1978

TO ALL COUNSEL OF RECORD

No. 77-5339 — United States of America vs. Edward Rodriguez, a/k/a Rick, Et Al.

Dear Counsel:

Enclosed is a copy of an order entered by the Court on its own motion directing that this case be reheard en banc with oral argument on a date thereafter to be fixed.

However, the court's consideration of the case en banc is limited to the following question:

> If the same agreement is charged as a violation of both 21 USC §846 and 21 USC §963, and the defendants are convicted of both offenses, may separate sentences be imposed for each offense? This question is discussed in Part VII of the panel opinion.

Please prepare your supplemental briefs and oral argument accordingly. Ancillary to this question, you may wish to comment on whether, as to Rodriguez and Albernaz, there was proof of a single conspiracy violating both statutes or two separate conspiracies. In order to preserve your right as to other issues in the case, the time for filing a petition for panel rehearing thereof is being extended for a period of fourteen (14) days from this date.

Pursuant to the court's direction for the Clerk to set a briefing schedule for the filing of supplemental briefs, appellants may have until December 13, 1978 for the filing of a supplemental brief, with opposing counsel to have until December 27, 1978. These dates are the dates on which the briefs must be in the Clerk's Office and not mailed on that date, because the case will be orally argued sometime during the week of January 22, 1979. Therefore, no extensions of time should be applied for. Counsel should hold themselves available for that week. Notice of the exact date should be forthcoming thirty (30) days in advance.

Very truly yours,

EDWARD W. WADSWORTH,
CLERK

By GILBERT F. GANUCHEAU,
Chief Deputy Clerk

In the United States Court of Appeals for the Fifth Circuit.

No. 77-5339

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

versus

EDWARD RODRIGUEZ, A/K/A RICK, THOMAS J. ALBERNAZ, PETER SMIGOWSKI, AND WILLIAM JOHN MARTINS,
DEFENDANTS-APPELLANTS.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(*November 20, 1978*)

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN AND VANCE, Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have this case reheard en banc,

IT IS ORDERED that this cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES of America, Plaintiff-Appellee,

v.

Edward RODRIGUEZ, a/k/a Rick, Thomas J. Albernaz, Peter Smigowski, and William John Martins, Defendants-Appellants.

No. 77-5339.

United States Court of Appeals, Fifth Circuit.

Feb. 27, 1980.

Defendants were convicted in the United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, Chief Judge, of conspiracy to import marijuana and conspiracy to distribute marijuana. They received dual, consecutive sentences. Upon their appeal, the Court of Appeals, 585 F.2d 1234, affirmed in part and reversed in part. Upon granting rehearing en banc, the Court of Appeals, Brown, Circuit Judge, held that: (1) provisions of the Drug Control Act, one prohibiting a conspiracy to import a controlled substance and another prohibiting a conspiracy to distribute a controlled substance, authorize, in a proper case, the imposition of consecutive sentences where a conspiracy with dual objectives is involved, and (2) simultaneous trial and subsequent imposition of consecutive sentences for conspiring to achieve different illegal objectives does not violate the double jeopardy clause; specifically, where Congress intended, in enacting the two conspiracy provisions of the Drug Control Act, to permit the district court, in the careful exercise of its discretion, to impose consecutive sentences for convictions of conspiring to import a controlled substance and conspiring to distribute a controlled substance, convicting and sentencing the defendant in one proceeding to cumulative punishments does not put the defendant twice in jeopardy.

Affirmed in part, reversed in part and remanded.

Alvin B. Rubin, Circuit Judge, filed a dissenting opinion.

1. Statutes ⇐174

Difficult task of defining congressional intent is to be aided by the use of several tools of statutory construction.

2. Conspiracy ⇐28(3)

Congressional intent underlying the two specific conspiracy provisions of the Drug Control Act differed markedly from that underlying the general conspiracy statute. 18 U.S.C.A. § 371; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

3. Conspiracy ⇐28(3)

Like racketeering or gambling, the danger to society of a conspiracy to commit a specified narcotics offense or offenses is at least as great as the actual offense. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

4. Conspiracy ⇐51

Cumulative penalties for a conspiracy with dual objectives is consistent with the Drug Control Act's cumulation of substantive penalties. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

5. Criminal Law ⇐1210

As Congress is predominantly a lawyers' body, the Court of Appeals may attribute to Congress the intent to permit cumulative punishment where separate and specific statutes are involved. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

6. Criminal Law ⇐1210

State of the law of conspiracy at time of the Drug Control Act's passage certainly gave fair warning that separate specific conspiracy statutes would permit the cumulative punishment of a single conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

7. Conspiracy ⇐27

An indictment charging a conspiracy to violate the Drug Control Act does not require allegation or proof of an overt act. Comprehensive Drug Abuse Prevention and Control Act, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

8. Conspiracy ⇐28(3)

In respect to the statutes prohibiting conspiracy to import a controlled substance and conspiracy to distribute a controlled substance, it is clear that each statute requires proof of a common element, an agreement; but it is equally obvious that thereafter commonality ends; each requires proof of a different objective of the agreement, one to import, the other to distribute, and this is true even though the objects of the agreement may partially overlap. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

9. Criminal Law ⇐1210

Provisions of the Drug Control Act, one prohibiting a conspiracy to import a controlled substance and another prohibiting a conspiracy to distribute a controlled substance, authorize, in a proper case, the imposition of consecutive sentences where a conspiracy with dual objectives is involved. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963.

10. Criminal Law ⇐200(1)

Simultaneous trial and subsequent imposition of consecutive sentences for conspiring to achieve different illegal objectives does not violate the double jeopardy clause; specifically, where Congress intended, in enacting the two conspiracy provisions of the Drug Control Act, to permit the district court, in the careful exercise of its discretion, to impose consecutive sentences for convictions of conspiring to import a controlled substance and conspiring to distribute a controlled substance, convicting and sentencing the defendant in one proceeding to cumulative punishments does not put the defendant twice in jeopardy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 1013, 21 U.S.C.A. §§ 846, 963; U.S.C.A.Const. Amend. 5.

11. Criminal Law ⇐161

Examination of the interests underlying the double jeopardy clause reveals that its core concern is to protect against subsequent punishment once one has been endured and against subsequent prosecution following acquittal, with some narrow exceptions. U.S.C.A.Const. Amend. 5.

12. Criminal Law ⇐161

Double jeopardy clause precludes sentencing, in a separate proceeding, a defendant who has already been sentenced and whose first sentence has not been overturned. U.S.C.A.Const. Amend. 5.

13. Criminal Law ⇐161

Basic interests protected by the double jeopardy clause are those of repose and finality. U.S.C.A.Const. Amend. 5.

14. Criminal Law ⇐161

Double jeopardy clause requires only that courts punish within the limits that Congress intended; cumulative punishment, when imposed in one proceeding, or in separate proceedings as a result of a defendant's desire to have the proceedings separate, is proper so long as Congress intended to permit such cumulative punishment. U.S.C.A.Const. Amend. 5.

15. Criminal Law ⇐161

Double jeopardy clause imposes no limits on Congress' power to define the allowable unit of prosecution and punishment, at least so long as all charges are brought in a single proceeding. U.S.C.A. Const. Amend. 5.

16. Criminal Law ⇐1213

While Congress could so fragment a conspiracy that the aggregate punishment becomes cruel and unusual, protection from that action derives from the Eighth Amendment, not the double jeopardy clause. U.S.C.A.Const. Amends. 5, 8.

Appeals from the United States District Court for the Southern District of Florida.

Before COLEMAN, Chief Judge, BROWN, GOLDBERG,* AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.**

JOHN R. BROWN, Circuit Judge:

The seizure on the open seas of marijuana being transferred from the freighter *Labrador* to the *Catchalot II* caught a lot more than an enormous amount of an illegal substance. Not the least of the catch are the difficult legal issues of statutory construction and double jeopardy which we consider on this rehearing en banc. The panel in this case disagreed with prior decisions concerning these issues, but felt constrained to follow the existing precedent of this Court. We write today to endorse our existing precedent.

The issues we address concern only the consecutive sentences imposed on defendants Rodriguez and Albernaz[1] for conspiracy to import marijuana, in violation of 21 U.S.C.A. §§ 952 & 963, and conspiracy to distribute marijuana, in vi-

* Judge Goldberg, who participated in the submission of this case, took Senior status as of January 31, 1980 and is therefore no longer qualified to be a member of the Court en banc.

** Judges Kravitch, Frank M. Johnson, Jr., Garza, Henderson, Reavley, Politz, Hatchett, Anderson, Randall, Tate, Sam D. Johnson, and Thomas A. Clark have become members of the Court since January 23, 1979, when this case was taken under submission. They do not wish to participate in the decision.

1. The panel's dispositions with respect to Smigowski and Martins are reaffirmed. Smigowski and Martins stand convicted of violating only 21 U.S.C.A. § 963. On that count, each must serve a sentence of three years imprisonment and a special parole term of two years.

olation of 21 U.S.C.A. §§ 841 & 846. Those defendants made an agreement to import and distribute the marijuana, an agreement violating two separate and specific narcotics conspiracy statutes. We first decide that Congress intended for both statutes to apply separately and consecutively to such an agreement. That conclusion nets us a sharp-toothed "double jeopardy" shark; but we find that double jeopardy has little bite where but one trial occurred and congressional intent is clear. The defendants' consecutive sentences under two separate, specific, and narcotics-related conspiracy statutes are affirmed.[2]

The facts are set out in the panel opinion, 585 F.2d 1234[3] (5th Cir.) They show that defendants Rodriguez and Albernaz were involved in an agreement with the objectives of importing marijuana and then of distributing it domestically. For that agreement, the defendants were charged and convicted under two separate statutory provisions. They received consecutive sentences.[4]

The statutes involved in this case are parts of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L.No.91–513, 84 Stat. 1236 ("Drug Control Act"). Title III of this Act (Subchapter I of Chapter 13 of 21 U.S.C.A.) (entitled "Importation and Exportation") relates to imports and exports of controlled substances. Among its provisions is 21 U.S.C.A. § 952,[5] which defines and

2. We therefore reaffirm in all respects the panel's *disposition* of this case, though not its reasoning.

3. Some twenty tons of marijuana, "far more than the appellants could personally consume in the course of many lifetimes of furious effort . . . ," 585 F.2d at 1246, was seized. Consequently, no question of mere possession for personal use is involved. *See* 21 U.S.C.A. § 844. The Coast Guard and the Drug Enforcement Agency seized the marijuana as it was being off-loaded from the freighter *Labrador* to the *Catchalot II*. Thirteen Colombian seamen aboard the *Labrador* were tried separately and their conspiracy convictions were affirmed in part and reversed in part in *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978). The instant case involves four co-conspirators—Rodriguez, Albernaz, Smigowski, and Martins—who arranged the high seas transaction, and other matters, from within the United States.

All four were charged in two count indictments. Count I charged conspiracy to import marijuana. The substantive offense of importation is proscribed by 21 U.S.C.A. § 952. Conspiracy to violate § 952 is punishable under 21 U.S.C.A. § 963. Count II charged conspiracy to distribute marijuana. Distribution is proscribed by 21 U.S.C.A. § 841, and conspiracy to violate § 841 is proscribed by 21 U.S.C.A. § 846. Each was convicted by a jury on both counts.

The panel properly found the evidence insufficient to show the involvement of Smigowski and Martins in a conspiracy involving distribution of the marijuana, once it actually reached the United States. Their conviction on Count II was therefore properly reversed. But Rodriguez and Albernaz "perforce had to make some arrangements to dispose of their treasure," 585 F.2d 1247, and those two actually arranged (without the involvement of Smigowski or Martins) to transport, by means of Winnebagos, and distribute the marijuana once it reached shore. The panel therefore properly found the evidence sufficient with respect to both counts of the convictions of Rodriguez and Albernaz.

4. Rodriguez received consecutive four and one-half year terms, totaling nine years, as well as consecutive special parole terms. Albernaz received consecutive three and one-half year terms, totaling seven years and consecutive special parole terms. The length of the combined sentences thus exceeds the maximum five-year sentence under the conspiracy to distribute count alone, 21 U.S.C.A. § 841(b)(1)(B); it also exceeds the maximum five-year sentence under the conspiracy to import count alone, 21 U.S.C.A. § 960(b)(2).

5. (a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States

prescribes the act of unlawful importation. Title III of the Act (Subchapter II of Chapter 13 of 21 U.S.C.A.) (entitled "Control and Enforcement") relates to internal prevention and control of drug abuse. Among its provisions is 21 U.S.C.A. § 841,[6] which makes it unlawful to distribute controlled substances domestically. Each title of the Act contains its own, identically worded provision prohibiting conspiracy to commit any of the offenses described in that title of the Act:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C.A. §§ 846, 963. Thus, § 963 punishes conspiracy to import marijuana and § 846 punishes conspiracy to distribute marijuana domestically.

The defendants, Rodriguez and Albernaz, made an agreement with the dual objective of importing and then distributing marijuana domestically. Their conspiracy therefore violated both of the conspiracy provisions of the Drug Control Act. They now contend that the criminal conspiracy in which they engaged cannot subject them to the dual, consecutive sentences which they received.

I. Congruous Congress

The first question is one of congressional intent, for "it is necessary, following [the] practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties

from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Nonnarcotic controlled substances in schedules III, IV, or V

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance—

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe.

6. (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

for the single criminal transaction in which he engaged." *Simpson v. United States*, 435 U.S. 6, 12, 98 S.Ct. 909, 913, 55 L.Ed.2d 70, 76 (1977).

In *Simpson*, the Supreme Court dealt with two statutes, enacted at different times, proscribing the act of robbing a bank by using a firearm. The two armed bank robbers there were convicted in one trial of violating both statutes and assessed consecutive sentences. One statute, 18 U.S.C.A. § 2113(d), was enacted as part of the Bank Robbery Act of 1934, Pub.L.No.235, 48 Stat. 783. That Act set up a "carefully crafted hierarchy of penalties,"[7] adding five years to the maximum penalty for bank robbery if a weapon was used, and increasing the penalty still further if a kidnapping or death occurred during a robbery.[8] Since a weapon was used, the robbers received the enhanced penalty set out in the Bank Robbery Act, as codified at 18 U.S.C.A. § 2113(d). The second statute, 18 U.S.C.A. § 924(c), was added by floor amendment to the Gun Control Act of 1968, Pub.L.No.90–618, 82 Stat. 1213. That statute provided for enhanced punishment whenever any felony was committed by use of a firearm.[9] Convicted under this statute as well, the robbers received a second sentence to be served consecutively.

In order to determine congressional intent, the Supreme Court decided to apply "several tools of statutory construction . . . ." 435 U.S. at 12, 98 S.Ct. at 913, 55 L.Ed.2d at 76. The Court used four tools of construction. The legislative history was "sparse," yet it clearly indicated that the felony firearm statute was not intended to apply to the bank robbery statutes.[10] "[T]he principle that

7. *United States v. Canty*, 152 U.S.App.D.C. 103, 117, 469 F.2d 114, 128 (D.C. Cir. 1972).

8. (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assault any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

9. Whoever—

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

10. First is the legislative history of § 924(c). That provision, which was enacted as part of the Gun Control Act of 1968, was not included in the original Gun Control bill, but was offered as an amendment on the House floor by Representative Poff. 114 Cong.Rec. 22231 (1968). In his statement immediately following his introduction of the amendment, Representative Poff observed:

"For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111,

gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern . . . ," *id.* at 15, 98 S.Ct. at 914, 55 L.Ed.2d at 78, was also invoked. With its hierarchy of penalties and specific focus, the bank robbery statute was found more specific. The specificity principle was viewed as a corollary of a third tool of construction, the rule of lenity. The Court quoted its decision in *Ladner v. United States*[11]: " 'This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' " *Id.* Finally, the Court looked at the conduct of the Government as indicative of the common perception of the statutes, and found that for several years the Department of Justice advised all United States Attorneys not to prosecute under both § 2113(d) and § 924. *Id.* at 16, 98 S.Ct. at 914, 55 L.Ed.2d at 78.

[1] *Simpson's* teaching, therefore, is that the difficult task of divining Congressional intent is to be aided by the use of *several* tools of statutory construction.[12] *Simpson* does not limit the tools to be used to the four there used.[13] *Simpson* speaks to statutes proscribing substantive acts, not to conspiracy statutes governing acts of thought and agreement. *Simpson* deals with the interaction between a specific and a general statute, but not with the interaction between two specific statutes. The control of the use of firearms has differed historically and practically from that of narcotics, so again *Simpson* is not dispositive. Nor does it address the enactment of two statutes as a part of one comprehensive Act, an Act designed to pull together widely scattered and disorganized enactments from years past.[14]

Before beginning a formal analysis of the construction to be accorded the Drug Control Act, we pause to examine existing jurisprudence bearing upon the con-

112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers or with chapter 44 which defines other firearm felonies." *Id.* at 22232.

United States v. Simpson, supra, 435 U.S. at 13, 98 S.Ct. at 913, 55 L.Ed.2d at 77 (footnote omitted).

11. 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199, 205 (1958).

12. The rules of construction are ways of finding out the intent. The actual words used are important but insufficient. The report of congressional committees may give some clue. Prior drafts of the statute may show where meaning was intentionally changed. Bills presented but not passed may have some bearing. Words spoken in debate may now be looked at. Even the conduct of the litigants may be important in that the failure of the government to have acted over a period of time on what it now suggests as the proper interpretation throws light on the common meaning. But it is not easy to find the intent of the legislature.

Levi, *An Introduction to Legal Reasoning*, 15 U.Chi.L.Rev. 501, 520 (1948).

13. A classic and somewhat cynical inventory of the toolshed is contained in Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand.L.Rev. 395 (1950).

14. "The bill revises the entire structure of criminal penalties involving controlled drugs . . . ." H.R. No. 91-1444, 91st Cong., 2nd Sess. (1970) (hereafter cited as House Report), *reprinted in* [1970] U.S.Code Cong. & Admin. News, pp. 4566, 4570 (legislative history of Drug Control Act).

spiracy provisions of that Act, 21 U.S.C.A. §§ 846 & 963. We perceive two lines of precedent, neither of which obviates the need to examine congressional intent.

The first line begins with *Braverman v. United States*, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed. 23 (1942).[15] There, seven counts of conspiracy were brought under the general federal conspiracy statute, § 37 of the Criminal Code, 18 U.S.C. § 88 (now codified at 18 U.S.C.A. § 371). Each charged a conspiracy to violate a separate provision of the internal revenue law. Only one conspiratorial agreement, involving a scheme to manufacture, transport, and distribute moonshine, was shown by the evidence. The Court held that one agreement to commit seven different statutory offenses could not be punished by more than a single penalty under the general conspiracy statute:

> Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal object, it *differs from* successive acts which violate a single penal statute and from *a single act which violates two statutes.*

Id. at 54, 63 S.Ct. at 102, 87 L.Ed. at 28 (emphasis supplied) (citations omitted). Thus *Braverman* was clearly limited to the statutory construction of the general conspiracy statute.[16]

In *United States v. Mori*, 444 F.2d 240 (5th Cir.), *cert. denied*, 404 U.S. 913, 92 S.Ct. 238, 30 L.Ed.2d 187 (1971), this Court extended *Braverman* to a situation involving convictions under the general conspiracy statute and under a specific conspiracy statute, 21 U.S.C.A. § 174. Section 174, now repealed, proscribed conspiracy to import narcotics. The conviction under the general conspiracy statute was somewhat circular, in that it was based on the same substantive crime which was the object of the § 174 conspiracy.[17] We held in *Mori* that under general principles of statutory construction, the specific nature of the importation conspiracy statute precluded additional conviction under the catchall general conspiracy statute. *Id.* at 245.[18]

15. The panel in the case before us considered *Braverman* to state a principle of constitutional double jeopardy, 585 F.2d at 1248–49. *Braverman*, however, did not mention the Double Jeopardy Clause and clearly rested on statutory construction of the general conspiracy provision. *See* text Slip op. at 3466–3469, at ——— *infra*.

16. *Braverman* remains a limitation on the Government's ability to fragment a single conspiracy under *the general conspiracy statute*. *E. g., United States v. Tanner*, 471 F.2d 128 (7th Cir. 1972); *Calvaresi v. United States*, 216 F.2d 891 (10th Cir. 1954); *United States v. Cohen*, 197 F.2d 26 (3d Cir. 1952).

Braverman did not address the legislative history of the general conspiracy statute. But from this omission it should not be inferred that *Braverman* did not rest on statutory construction, for the practice of explicitly examining legislative history was not so prevalent as it is today. *See United States v. Constantine*, 296 U.S. 287, 298, 56 S.Ct. 223, 228, 80 L.Ed. 233, 240 (1936) (Cardozo, J., dissenting).

17. Clearly only one conspiracy was involved. Section 174 proscribed both the substantive act of importing narcotics and conspiracy to import narcotics. The general conspiracy statute violation was based on a conspiracy to violate the Travel Act, 18 U.S.C.A. § 1952. Section 952 made illegal traveling in foreign commerce to promote unlawful activity. But the unlawful activity was the importation of narcotics in violation of § 174. *United States v. Mori, supra*, 444 F.2d at 242.

18. In distinguishing *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946), we stated that:

> In the instant case, however, we do not have two independent criminal conspiracy statutes. Rather, the defendant herein was indicted under a specific conspiracy statute and a general conspiracy statute. Under

The convictions and concurrent sentences were vacated and the case remanded for imposition of sentence on one count. *But cf. United States v. Nathan*, 476 F.2d 456, 458–59 (2d Cir.), *cert. denied*, 414 U.S. 823, 94 S.Ct. 171, 38 L.Ed.2d 56 (1973) (dual sentences upheld where single conspiracy violated both § 174, proscribing an importation conspiracy, and 18 U.S.C.A. § 371 (the general conspiracy statute), as applied to 26 U.S.C.A. § 4704 (proscribing certain narcotics possession conspiracies)).

Without any discussion of congressional intent (or double jeopardy), the Sixth Circuit in *United States v. Adcock*, 487 F.2d 637 (1973), became the first to consider dual convictions under the specific conspiracy statutes of the Drug Control Act, 21 U.S.C.A. §§ 846 & 963. The Court held that the evidence established only one conspiracy and that the defendants could not be sentenced both for conspiracy to import and conspiracy to distribute. The Court cited only *Braverman* and *Mori* in support of its holding, and did not address the fact that these earlier cases dealt with the general conspiracy statute. *See United States v. McGowan*, 385 F.Supp. 956, 959 n.5 (D.N. J.1974) (dictum).[19]

United States v. Honneus, 508 F.2d 566 (1st Cir. 1974), *cert. denied*, 421 U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101 (1975), marks the end of the first line of decisions.[20] There, the First Circuit also invoked *Braverman* and *Mori*. Three conspiracy convictions were involved: (i) 21 U.S.C.A. § 846 (distribution), (ii) 21 U.S. C.A. § 963 (importation), and (iii) the general conspiracy statute, 18 U.S.C.A. § 371 (for conspiring to smuggle "merchandise" in violation of 18 U.S.C.A. § 545). Congressional intent was only tangentially addressed, as the Court expressed "doubt that [Congress] meant to authorize, or *could* authorize, a court to impose three punishments for one conspiracy." *Id.* at 569 (emphasis supplied). The Court vacated the sentences and remanded for imposition of only one sentence.

Decided four years after *Braverman*, *American Tobacco Co. v. United States*, *supra*, begins the second line of precedent. There, before reaching the central issue, the Supreme Court decided to "touch upon another contention which the petitioners made and which the government has undertaken to answer." 328 U.S. at 787, 66 S.Ct. at 1128, 90 L.Ed. at 1582. The contention was that *Braverman* laid down an inflexible prohi-

general principles of statutory constructions, the catchall provisions of section 371 become subsumed under the particular, specific provisions of section 174.

444 F.2d at 245.

19. Except for dictum in *United States v. Mayes*, 512 F.2d 637, 652 (6th Cir. 1975) (a general conspiracy statute case), the Sixth Circuit has since relied upon *Adcock* in only one case. In *United States v. Fruit*, 507 F.2d 194, 195 (1974), that Court held that only one sentence could stand where a single conspiracy violated the Civil Rights Act's conspiracy statute, 18 U.S.C.A. § 241 as well as 18 U.S.C.A. § 1509, proscribing conspiracy to interfere with a court order. We have tacitly disagreed. *Hayes v. United States*, 464 F.2d 1252 (5th Cir. 1972); *United States v. Hayes and McMaster*, 444 F.2d 472 (5th Cir.), *cert. denied*, 404 U.S. 882, 92 S.Ct. 210, 30 L.Ed.2d 163 (1971). *Fruit* reinforces the notion that *Adcock* was decided without reference to congressional intent, since *Fruit* simply stated *Adcock*'s "one conspiracy, *ergo* one sentence" rule and proceeded to apply it, despite the differences in the legislation involved.

20. *Honneus* was summarily followed by the First Circuit in *United States v. Rivera Diaz*, 538 F.2d 461, 466 (1976). *See also United States v. Cruz Pagan*, 537 F.2d 554, 559 (1st Cir. 1976) (dictum).

bition against the criminal conviction of both conspiracy to restrain trade (in violation of § 1 of the Sherman Act, 15 U.S.C.A. § 1) and conspiracy to monopolize (in violation of § 2 of the Sherman Act, 15 U.S.C.A. § 2), where but one conspiratorial agreement was shown. The Court disagreed, and refused to extend *Braverman* from its interpretation of the general conspiracy statute to the different statutory scheme of the Sherman Act:

> In contrast to the single conspiracy described in [*Braverman*] in separate counts, all charged under the general conspiracy statute, § 37, Criminal Code, 35 Stat. 1096, 18 U.S.C. § 88 [now 18 U.S.C.A. § 371], *we have here separate statutory offenses*, one a conspiracy in restraint of trade . . ., and the other a conspiracy to monopolize . . . . One is made criminal by § 1 and the other by § 2 of the Sherman Act.

Id. at 788, 66 S.Ct. at 1128, 90 L.Ed. at 1582 (emphasis supplied).[21]

The Ninth Circuit considered the specific conspiracy statutes before us—21 U.S.C.A. §§ 846 & 963—in *United States v. Marotta*, 518 F.2d 681 (1975). The Court upheld the separate sentences involved by resort to two principles of statutory interpretation. First, it looked to the settled intent of Congress for narcotics legislation prior to the Drug Control Act: to severely punish narcotics trafficking by plugging "loopholes" and turning " 'the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter.' " *Id.* at 685 (quoting *Gore v. United States*, 357 U.S. 386, 390, 78 S.Ct. 1280, 1283, 2 L.Ed.2d 1405, 1408 (1958)). That intent was deemed to have carried over to the enactment of the two specific conspiracy statutes in the Drug Control Act.[22] The Court also relied on the existence of two separate, distinct and specific statutes to infer that:

> . . . Congress fully intended to permit punishing such conspiracies twice as severely as those which embraced only one of the specified criminal objects. . . . Congress has in effect determined that a conspiracy to import drugs with intent to distribute is twice as serious as a conspiracy to import for personal use or a conspiracy to possess with intent to distribute.

Id. (citation omitted).[23]

[2] Endorsing and quoting the reasoning of the Ninth Circuit in *Marotta*, this Court upheld separate punishments

21. That *Braverman* did not establish an inflexible rule that all conspiracies which either violate separate statutes, or which allege the violation of several statutes as objects of the agreement, must be treated as a single offense was suggested in *American Tobacco Co. v. United States*, 328 U.S. 781, 787, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946). Rather, the permissibility of multiple punishments appears to turn upon legislative intent as divined from the statutory scheme set forth by Congress. *Id. See generally*, "Developments in the Law: Criminal Conspiracy," 72 Harv.L.Rev. 921, 963–68 (1959). *United States v. McGowan, supra*, 385 F.Supp. at 959 n.5.

22. *See United States v. Ortiz-Martinez*, 557 F.2d 214, 217 (9th Cir. 1977) (interpreting *Marotta*).

23. The Court distinguished *Mori*:

> We adhere to the reasoning in *Mori* in so far as it holds that where specific conspiracy statutes have been enacted, Congress intended to replace and not supplement the general conspiracy statute. However, *Mori* does not aid appellant here who was convicted of violating two specific conspiracy statutes.

Id. at 684.

under §§ 846 and 963 in *United States v. Houltin*, 525 F.2d 943, 951 (1976), *vacated sub nom. Croucher v. United States*, 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745 (1977).[24] We pointed out that the congressional intent underlying §§ 846 and 963 differed markedly from that underlying the general conspiracy statute:

> [The *Braverman*] holding reflected the Court's view that the congressional intent underlying [the general conspiracy statute] was to adopt the common law definition of conspiracy, thereby proscribing the *agreement* to commit unlawful acts against the United States rather than the unlawful objects themselves.

Id. at 951 (emphasis in original).[25]

The Fourth Circuit agreed with our decision in *Houltin*, stating that:

> . . . in enacting the federal narcotics acts the Congress regarded conspiracy to import heroin and conspiracy to distribute heroin in the United States not only as separate offenses but as offenses so compounding each other that a conspiracy embracing each should be treated as two separate conspiracies, warranting the imposition of successive sentences for violations of the two separate conspiracy statutes.

United States v. Garner, 574 F.2d 1141, 1147, *cert. denied*, 439 U.S. 936–37, 99 S.Ct. 333, 58 L.Ed.2d 333 (1978). Citing *Simpson*, the Fourth Circuit observed that "[w]hat is required . . . is that *each* separate conspiracy statute be examined to determine the congressional intent with respect to the possible imposition of successive sentences." *Id.* at 1146–47 (emphasis supplied).[26]

24. The case was vacated for reasons unrelated to the issues before us today. In *Houltin* the defendants had earlier been convicted in state court of a charge that was "substantially similar" to the § 846 conspiracy charge. The § 963 conspiracy to import charge was quite distinct from the earlier state court charges, however. Because then-existing guidelines of the Department of Justice did not approve of prosecution under § 846 where a substantially similar conviction under state law had been obtained, the Solicitor General asked the Supreme Court to vacate the § 846 conviction:

> We believe, however, that petitioners' prosecution for conspiracy to possess marijuana was not supported by an independent compelling federal interest in light of the substantial similarity between that charge and the offense of which petitioners were convicted in state court. We therefore respectfully request the Court to permit the effectuation of this governmental policy by granting the petition, vacating the judgment of the court of appeals only as to the charge of conspiracy to possess marijuana (count two), and remanding the case to the district court with instructions to grant the government's motion to dismiss that count.

> Memorandum by Solicitor General filed with the Supreme Court on Dec. 2, 1976, *quoted in United States v. Houltin*, 553 F.2d 991 (5th Cir. 1977) (on remand). The Supreme Court accordingly vacated the case and remanded to us "for reconsideration in light of the position presently asserted by the government." We in turn remanded to the District Court "with instructions to grant the government's motion to dismiss . . . ." 553 F.2d at 992.

25. *Houltin*'s holding was adopted without comment by *United States v. Dyar*, 574 F.2d 1385 (5th Cir.), *cert. denied*, 439 U.S. 982, 99 S.Ct. 570, 58 L.Ed.2d 633 (1978). We express no opinion today as to *United States v. Smith*, 574 F.2d 308 (5th Cir.), *modified on rehearing*, 594 F.2d 1084, *cert. denied*, 439 U.S. 931, 99 S.Ct. 321, 58 L.Ed.2d 325 (1978) (extending *Houltin* to conspiracy convictions under 21 U.S.C.A. § 846 and 21 U.S.C.A. § 962(d)).

26. Although the denial of certiorari in *Garner* has no precedential value, the views of two Justices are revealed by their dissent from the denial of certiorari. The two Justices argued that certiorari should have been granted on an unrelated ground, but that the consecutive sentence issue was correctly decided by the Fourth Circuit. The writing Justice stated:

We find the latter line of precedent more persuasive because those cases at least attempted to analyze the particular intent of Congress for the statutes at issue: the two specific conspiracy statutes of the Drug Control Act. We do not dispute that the common law principle that a single conspiracy is a single crime does not have some relevance in construing the congressional intent behind any conspiracy statute, and that in the case of the *general* conspiracy statute the common law principle may be the most important evidence of congressional intent. But each conspiracy statute, each statutory scheme has its own characteristics. The statutes before us today are especially unique, so we must apply our tools of statutory construction with an eye to the special circumstances surrounding this country's narcotics laws and the Drug Control Act.

First is legislative history. The Drug Control Act replaced eighty years of piecemeal attempts by Congress to combat the illegal importation, distribution, and use of narcotics.[27] In 1958, the Supreme Court reviewed the legislative history of those narcotics enactments in *Gore v. United States*, 357 U.S. 386, 388–93, 78 S.Ct. 1280, 1282–84, 2 L.Ed.2d 1405, 1407–10. There the defendant was convicted and consecutively sentenced under three statutes—enacted at different times—for a single sale of narcotics. The Court pointed out that it had considered a number of cases involving "prosecutions under successive enactments dealing with the control of narcotics," and it "was not an innocent in the history of narcotics legislation." *Id.* at 388, 78 S.Ct. at 1282, 2 L.Ed.2d at 1408. Drawing on this experience, the Court concluded that:

> . . . the various enactments by Congress extending over nearly half a century constitute a network of provisions, steadily tightened and enlarged, for grappling with a powerful, subtle and elusive enemy. If the legislation reveals anything, it reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter.

Id. at 390, 78 S.Ct. at 1283, 2 L.Ed.2d at 1408. The three sentences were affirmed.

Congress's desire to severely punish those involved with narcotics did not abate after *Gore*. *See, e. g.*, The Narcotics Manufacturing Act of 1960, Pub.L. No. 86–429, 74 Stat. 55; H.R. No. 1486,

Garner also contends that the prosecution proved that he participated in no more than one conspiracy. Thus, he argues that he should not have received consecutive sentences after conviction on the two conspiracy counts. I believe the Court of Appeals properly decided this issue, and would limit the grant of certiorari to the evidentiary question.

439 U.S. at 936–37, 99 S.Ct. at 334, 58 L.Ed.2d at 333.

Our survey of existing jurisprudence would be incomplete without mention that the Second Circuit affirmed dual punishment under §§ 846 and 963 in *United States v. Stassi*, 544 F.2d 579 (1976), *cert. denied*, 430 U.S. 907, 97 S.Ct. 1176, 51 L.Ed.2d 582 (1977), although the statutory construction issue was apparently not raised there; and the Eighth Circuit in *United States v. Williams*, 548 F.2d 228, 232–33 (1977), specifically avoided ruling on the issue.

27. The first attempt was the Act of Feb. 23, 1887, Ch. 210, §§ 1–3, 24 Stat. 409, which provided for the forfeiture of any opium shipped between the United States and China. Between 1909 and 1970, a new piece of narcotics legislation was enacted, on the average, every four years. *See* Drug Control Act, Pub.L. No. 91–513, §§ 701, 1101–02, 84 Stat. 1237, 1281, 1291–1294.

89th Cong., 2nd Sess. (1966), *reprinted in* [1966] U.S.Code Cong. & Admin.News, pp. 4245, 4249–50 (legislative history of law creating civil commitment for addicts). The President's Advisory Commission on Narcotics and Drug Abuse, in a report which precipitated the drafting of the Drug Control Act, stated:

> The illegal traffic in drugs should be attacked with the full power of the Federal Government. The price for participation in this traffic should be prohibitive. It should be made too dangerous to be attractive.

House Report, *supra* [1970] U.S.Code Cong. & Admin.News at 4575. *See also* Note, 1978 B.Y.U.L.Rev. 179.

Against this background of increasingly punitive narcotics legislation, the President proposed on July 14, 1969, a comprehensive Act "providing increased law enforcement authority in the field of drug abuse. . . . ." House Report, *supra* [1970] U.S.Code Cong. & Admin. News at 4567. The proposed legislation had eight sections, denominated titles.[28] Proposed § 501(a) of Title V ("Offenses and Penalties") proscribed distributing, manufacturing, possessing, importing, and exporting of various controlled substances. A single subsection, § 501(c), penalized any substantive act violating § 501(a). Thus the punishment for the substantive act of importing and distributing controlled substances was set out in a single provision of the proposed legislation. Similarly, § 504 made unlawful any conspiracy to "commit any offense defined in this title." Thus a conspiracy to import and distribute controlled substances was proscribed by a single provision, § 504, and punished by another, § 501(c).[29]

In order to conform to the existing jurisdictional lines between the Committee on Ways and Means and the Committee on Interstate and Foreign Commerce, the proposed legislation was split and separately considered by the two House committees. The Ways and Means Committee took jurisdiction over matters relating to import and export of narcotics, and that portion of the legislation was then transmitted to the Interstate and Foreign Commerce Committee, which recombined the legislation. House Report, *supra* at 2–3, [1970] U.S.Code Cong. & Admin.News at 4567–68. The Committee's product, except for minor amendment on the floor of the House, was enacted unchanged as the Drug Control Act.

Appellants contend that the existence of two separate and specific conspiracy statutes in the Drug Control Act is the result of the separation of the legislation between the two House committees. Thus they argue that no weight should be accorded the fact that two provisions exist. They correctly point out that the House Report gives no indication of the intent behind the enactment of two conspiracy provisions. Therefore they claim that the legislative history of the provisions is inconclusive. We disagree. As

28. The proposed titles correspond closely to parts A–E, & G of Title II and parts A & B of Title III of the Drug Control Act, as enacted. *See* S. 2637, 91st Cong., 1st Sess. (1969); H.R. 13742 & 13743, 91st Cong., 1st Sess. (1969).

29. Section 504 punished conspiracy by "imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the . . . conspiracy." This provision actually granted greater discretion in sentencing for conspiracy than for a substantive offense, since the penalty imposed under the proposed legislation for most substantive violations called for a *minimum* sentence not merely a maximum.

in *Simpson*, we find the legislative history sparse but sure.

First, this was carefully drafted legislation. The enacted legislation evidences a great deal of coordination between the two committees. Titles II and III of the Drug Control Act contain numerous interrelated provisions. *E. g.*, 21 U.S.C.A. §§ 812, 848, 849, 951, 962 & 965. *See United States v. Gomez-Tostado*, 597 F.2d 170 (9th Cir. 1978) (interaction between the titles). Both titles have parallel penalty structures, imposing similar penalties on similar crimes. *Compare* 21 U.S.C.A. § 841(b)(1)(A) *with* 21 U.S.C.A. § 960(b)(1). This similarity is significant because the penalties are *different* from those proposed by the President and transmitted to the committees. *Compare* 21 U.S.C.A. §§ 841(b), 960(d) *with* § 501(c)(1) of the proposed legislation.[30]

Also indicative of the nonaccidental nature of the two specific conspiracy provisions are the remarks by the sponsor of Title III. Immediately after his introduction of the legislation on the floor of the House, Representative Boggs was permitted to propose several perfecting amendments, which were passed. In proposing the amendments, Representative Boggs stated:

> Only the last amendment has any substantive effect. This last amendment provides that section 1013 [now 21 U.S.C.A. § 963]—relating to attempts and conspiracies—and section 1015 [now 21 USCA § 965]—relating to the applicability of title II enforcement and administrative provisions—will take effect at the same time as the comparable provisions of title II.

116 Cong.Rec. 33665 (1970). While these remarks are less probative of a congressional judgment than those in *Simpson*, *see* note 10, *supra*, and although they "are of course not dispositive of the issue . . . , they are certainly entitled to weight, coming as they do from the provision's sponsor." *Simpson, supra*, 435 U.S. at 13, 98 S.Ct. at 913, 55 L.Ed.2d at 77.

[3, 4] Finding a congressional judgment to permit consecutive punishments under the dual conspiracy statutes is also consistent with the deterrent rationale and the legislative history of other provisions of the Drug Control Act. It is clear that Congress intended the *substantive* act of importation and distribution of controlled substances to be cumulatively punished, in the discretion of the sentencing judge. *United States v. Dubrofsky*, 581 F.2d 208, 213–14 & n.2 (9th Cir. 1978); *United States v. Valot*, 481 F.2d 22, 27–28 (2d Cir. 1973). *Cf. United States v. Hernandez*, 591 F.2d 1019, 1022 & n.9 & 10 (5th Cir. 1979). And like racketeering, *see Callanan v. United States*, 364 U.S. 587, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961), or gambling, *see Iannelli v. United States*, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975), the danger to society of a conspiracy to commit a specified narcotics offense or offenses is at least as great as the actual offense: Narcotics abuse is "a social evil as deleterious as it is *difficult to combat* . . . ," *Gore v. United States, supra*, 357 U.S. at 389, 78 S.Ct. at 1283, 2 L.Ed.2d at 1408 (emphasis supplied). Against such a difficult foe, cumulative

30. The proposed legislation permitted imposition of a lighter sentence for conspiracy than for substantive crimes. *See* note 29, *supra*. Reformation of the penalties for substantive acts by both House committees equalized the penalties imposable for conspiracy and substantive crimes. It is significant that neither committee lowered the conspiracy penalty in order to conform to the original, proposed legislation's penalty structure.

penalties for a *conspiracy* with dual objectives is consistent with the Drug Control Act's cumulation of *substantive* penalties. It is not surprising that Congress intended to allow the District Courts a wide measure of discretion to punish a conspiracy involving such dual objectives, in an appropriate case, by means of consecutive sentences. *Cf. Pot Full of Discretion: Comprehensive Drug Abuse Prevention and Control Act of 1970*, 34 Tex.B.J. 497 (1971).

[5, 6] Besides legislative history, the application of other tools of statutory construction support our finding that "Congress has in effect determined that a conspiracy to import drugs [and to distribute them] is twice as serious as a conspiracy [to do either object singly]," *United States v. Marotta, supra*, 518 F.2d at 685. As the related principle to that of giving precedence to the specific statute over the general, the existence of two specific provisions within the same comprehensive Act of Congress is a useful tool of statutory construction. As "Congress is predominantly a lawyers' body," *Callanan v. United States, supra*, 364 U.S. at 594, 81 S.Ct. at 325, 5 L.Ed.2d at 317, we may attribute to Congress the intent to permit cumulative punishment where separate and specific statutes are involved. *Cf. Gore v. United States, supra.* Moreover, the state of the law of conspiracy at the time of the Drug Control Act's passage certainly gave fair warning that separate specific conspiracy statutes would permit the cumulative punishment of a single conspiracy. *See American Tobacco Co. v. United States, supra*; Anderson, Wharton's Criminal Law and Procedure § 83 (1957). *Cf. United States v. James*, 161 U.S.App.D.C. 88, 104–05, 494 F.2d 1007, 1025–26 (D.C. Cir.) (cumulative sentences upheld for a single conspiracy violating three separate specific conspiracy statutes of the pre-1970 narcotics law), *cert. denied sub nom., Jackson v. United States*, 419 U.S. 1020, 95 S.Ct. 495, 42 L.Ed.2d 294 (1974).

"Lenity" is another tool of statutory construction. Like the many Courts which have considered narcotics statutes, *see supra* Slip opinion at 3466–3468, at ———, *United States v. Valot, supra*, 481 F.2d at 27 & n.3, and in accord with the express intent of Congress in the enactment of the Drug Control Act, *see supra*, Slip opinion at 3468–3471, at ———, we question the application of a principle of lenity when Congress has plainly intended severity. Although lenity is a principle, the common meaning of the word suggests "being lenient," "mildness," as opposed to "severity." Webster's New Collegiate Dictionary 481 (1961 ed.). Moreover, in *Gore v. United States, supra*, the Supreme Court contemplated the principle of lenity in the context of the narcotics laws. It concluded:

> This situation is *toto coelo* different from the one that led to our decision in *Bell v. United States*, 349 U.S. 81, [75 S.Ct. 620, 99 L.Ed. 905]. That case involved application of the Mann Act—a single provision making it a crime to transport a woman in interstate commerce for purposes of prostitution. We held that the transportation of more than one woman as a single transaction is to be dealt with as a single offense, for the reason that when Congress has not explicitly stated what the unit of offense is, the doubt will be judicially resolved in favor of lenity. It is one thing for a single transaction to include several units relating to proscribed conduct under a single provision of a statute.

> It is a wholly different thing to evolve a rule of lenity for three violations of three separate offenses created by Congress at three different times, all to the end of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics. Both in the unfolding of the substantive provisions of law and in the scale of punishments, Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws.

357 U.S. at 391, 78 S.Ct. at 1283, 2 L.Ed.2d at 1409. Where *separate* and *specific* provisions of the narcotics law are involved, we adhere to *Gore's* view that Congress intended not leniency but rather cumulative penalties.[31]

The *Blockburger*[32] test is another tool of statutory construction. "The *Blockburger* test has its primary relevance in the double jeopardy context," *Simpson, supra*, 435 U.S. at 11, 98 S.Ct. at 912, 55 L.Ed.2d at 76, but the test itself derives from a decision involving statutory interpretation.[33] As a tool of statutory interpretation—as opposed to a double jeopardy test—the *Blockburger* test is perhaps less useful than some because it so easily indicates that Congress intended cumulative punishment.[34] Where a comprehensive Act of Congress is involved, however, this criticism has less force and the *Blockburger* test is more probative of intent.

Blockburger sets out the technical requirement that each of the two statutory provisions require proof of a fact which the other does not:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304, 52 S.Ct. at 182, 76 L.Ed. at 309. In *United States v. Cowart*, 595 F.2d 1023 (1979), this Court interpreted the *Blockburger* test to focus on the *elements* of the offense charged, *not* on the evidence adduced at trial. *See also United States v. Nelson*, 599 F.2d 714, 716–17 (5th Cir. 1979); *United States v. Bankston*, 603 F.2d 528, 534 (5th Cir. 1979). At least for purposes of statutory interpretation and where multiple trials

31. *Cf. Jeffers v. United States*, 432 U.S. 137, 156 n.26, 97 S.Ct. 2207, 2219 n.26, 53 L.Ed.2d 168, 184 n.26 (1977) (dictum). An examination of precedent both before and since the Drug Control Act also indicates that the Government has consistently and frequently treated specific narcotics conspiracy statutes as providing cumulative punishments. *See supra* Slip opinion at 3465–3468, at ——–——; *United States v. James, supra*.

32. *Blockburger v. U. S.*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

33. That the *Simpson* Court may have disdained using *Blockburger* as a test for *statutory construction* is refuted by footnote 4 of that decision, which carefully analyzed the statutes in a *Blockburger* framework. Dictum in *Iannelli v. United States, supra*, 420 U.S. at 785 n.17, 95 S.Ct. at 1293 n.17, 43 L.Ed.2d at 627 n.17, describes the *Blockburger* test as serving a "function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction." *But cf. Jeffers v. United States, supra* (for situations involving multiple trials, *Blockburger* is more than a tool of statutory construction).

34. *Cf.* Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal Doctrine*, 58 Calif.L.Rev. 357 (1970).

are not at issue, we endorse *Cowart's* interpretation of the *Blockburger* test.[35]

[7, 8] It is therefore irrelevant that much of the proof at trial was directed towards both of the conspiracy counts. Appellants' argument[36] that the same overt acts were alleged in each conspiracy count is equally irrelevant to the *Blockburger* test in this situation.[37] Instead, only the elements set out in the two conspiracy statutes, 21 U.S.C.A. §§ 846 & 963, must be closely compared. It is obvious that each statute requires proof of a common element, the agreement. It is equally obvious that thereafter commonality ends; each requires proof of a *different* objective of the agreement, one to import, the other to distribute. This is true even though the objects of the agreement may partially overlap. *Cf. American Tobacco Co. v. United States, supra*, 328 U.S. at 788, 66 S.Ct. at 1128, 90 L.Ed. at 1582. The *Blockburger* test therefore shows the conspiracy statutes to create separate offenses. As a tool of statutory construction, *Blockburger* supports an intent by Congress to cumulatively punish a conspiracy with the dual objectives of importation and distribution of controlled substances.

[9] A number of tools of statutory construction thus lead us to construe sections 846 and 963 to authorize, in the proper case, the imposition of consecutive sentences where a conspiracy with dual objectives is involved. As a result the issue before us broadens and takes on constitutional dimensions.

II. Double Jeopardy's Jaws[38]

[10] The issue which we now must confront is whether the simultaneous trial and subsequent imposition of consecutive sentences for conspiring to achieve different illegal objectives violates the

35. Our decisions have not been completely consistent. All have construed *Blockburger* in its usual double jeopardy context; in that context there may be a distinction between the use of *Blockburger* in situations involving multiple trials as opposed to multiple punishment in one trial. Cases from this Circuit which at least express a view different from *Cowart* include: *United States v. Marable*, 578 F.2d 151 (1978), and *United States v. Ruigomez*, 576 F.2d 1149 (1978). *Cf. United States v. Stricklin*, 591 F.2d 1112 (5th Cir. 1979). To the contrary are: *United States v. Bankston, supra; United States v. Garcia*, 589 F.2d 249 (5th Cir. 1979); and *United States v. Smith, supra*. *Cowart* considered and rejected the viewpoint of the Sixth Circuit in *United States v. Austin*, 529 F.2d 559 (1975). Like the Fourth Circuit, *United States v. Peterson*, 524 F.2d 167 (1975), *cert. denied*, 423 U.S. 1088, 96 S.Ct. 881, 47 L.Ed.2d 99 (1976), and, subsequently, the Ninth Circuit, *United States v. Solano*, 605 F.2d 1141 (1979), *Cowart* reasoned that Supreme Court precedent and policy were contrary to the interpretation of *Blockburger* set out by *Austin*.

36. Their argument is put forth in the double jeopardy context.

37. We recognize some confusion in the Circuit as to whether an indictment charging a conspiracy to violate the Drug Control Act must set out and the Government must prove at least one overt act. Consistent with the majority of our decisions, we now expressly hold that these indictments do *not* require allegation or proof of an overt act. *See, e. g., United States v. Bates*, 600 F.2d 505 (5th Cir. 1979); *United States v. Robinson*, 591 F.2d 1202 (5th Cir. 1979); *United States v. Michel*, 588 F.2d 986 (5th Cir. 1979); *United States v. Thomas*, 567 F.2d 638 (5th Cir. 1978); *United States v. Palacios*, 556 F.2d 1359 (5th Cir. 1977). *See also United States v. Umentum*, 547 F.2d 987 (7th Cir. 1976).

38. "Shark! Shark!," the captain of the *Labrador* called out as a pre-arranged warning when the Coast Guard and DEA intervened in the off-loading operation. *United States v. Cadena, supra*, 585 F.2d at 1256.

Double Jeopardy Clause. We find that where Congress intended to permit the District Court, in the careful exercise of its discretion, to impose consecutive sentences, convicting and sentencing a defendant in one proceeding to cumulative punishments does not put the defendant twice in jeopardy. While there are certain prohibitions flowing from other parts of the Constitution, the Double Jeopardy Clause does not protect such a defendant.[39]

We emphasize that the case before us does not involve a number of related but different double jeopardy problems. First, this is not a case where a defendant is tried and sentenced under one statute, serves part or all of that sentence, and then is indicted for the same act under a similar statute. There, the defendant is subjected to the anxiety of not knowing when his punishment will finally end; nor can the sentencing forum ascertain, at any one sentencing, the extent to which the defendant will be punished. Second, this case does not involve retrial following acquittal, which subjects the defendant to "continuing distress" and prevents him from considering the matter closed and planning ahead accordingly. Note, *Twice in Jeopardy, supra* at 277. Nor do we face the imposition of cumulative punishments that Congress either did not intend nor authorize.[40] Instead we address the simultaneous trial and imposition of consecutive sentences where Congress intended, through the enactment of specific provisions in the same piece of legislation, to permit the imposition of longer, consecutive sentences where the sentencing forum deemed it appropriate.

[11–13] An examination of the interests underlying the Double Jeopardy Clause reveals that its core concern is to protect against subsequent punishment once one has been endured and against subsequent prosecution following acquittal, with some narrow exceptions.[41] The Clause derives from the early English pleas of *autrefois acquit, autrefois attaint,* and *autrefois convict.*[42] *Green v. United States, supra,* 355 U.S. at 187–88, 78 S.Ct. at 223, 2 L.Ed.2d at 204, reviewed the history of the Clause and concluded:

39. A number of authors have considered the double jeopardy issue where cumulative punishment occurs: Westen & Drubel, *Toward A General Theory Of Double Jeopardy,* 1978 S.Ct.Rev. 81; Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review,* 69 J.Crim.L. & Criminology 19 (1978); Note, *Double Jeopardy: Multiple Prosecutions Arising From The Same Transaction,* 15 Am.Crim.L. Rev. 259 (1978); Note, *Twice in Jeopardy,* 75 Yale L.J. 262 (1965). *See also* Notes, 10 Rut.-Cam.L.J. 149 (1978); 52 Wash.L.Rev. 142 (1976). *Cf.* Schwartz, *Multiple Punishment for the "Same Offense": Michigan Grapples with the Definition of a Problem,* 25 Wayne L.Rev. 825 (1979).

40. The Due Process Clause affords overlapping protection where a person is cumulatively punished yet the statutes do not authorize such punishment. *See* note 43, *infra.*

41. Although the issue rarely arises, the Double Jeopardy Clause also precludes sentencing, in a *separate* proceeding, a defendant who has already been sentenced and whose first sentence has not been overturned. *Cf. Ex parte Lange,* 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873).

42. A history of these pleas is contained in *Ex parte Lange, supra,* and in Mr. Justice Frankfurter's dissenting opinion in *Green v. United States,* 355 U.S. 184, 198, 78 S.Ct. 221, 229, 2 L.Ed.2d 199, 210 (1957). These were defensive pleas to be interposed only where a second indictment charged the same crime for which "a person . . . has had the benefit of clergy, *and suffered the judgment of the law.* . . ." *Ex parte Lange, supra,* 85 U.S. (18 Wall.) at 169, 21 L.Ed. at 876 (emphasis in original) (quoting 4 W. Blackstone, Commentaries * 315).

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187–88, 78 S.Ct. at 223, 2 L.Ed.2d at 204. As articulated by *Green*, the basic interests protected are those of repose and finality.

Although the Supreme Court has yet to squarely consider the Clause's application to cumulative punishments in a single proceeding,[43] it has construed the Clause in a number of recent decisions, some of them relevant to the issue we confront.

The issue in *North Carolina v. Pearce, supra*, was whether a defendant who had been convicted and sentenced, who then served part of that sentence before successfully attacking his first conviction, and who was convicted again, could be given upon resentencing a longer sentence than originally imposed. The case obviously involved the imposition of a second sentence after the first, and presumably final, sentence had been partially served. The defendant's interests in repose and finality were therefore directly at issue. But the defendant, not the Government, sought the appeal which vacated his original sentence, and thus the defendant in a sense waived his interests in repose and finality. The Court found that the defendant did not "waive" his interests to the extent that he expected his appeal to not result in any loss of time already served under the original sentence. Balancing those interests against those of the Government, the Court held that (i) double jeopardy does *not* preclude imposing a more severe sentence on reconviction but that (ii) it does require that the punishment already endured be subtracted from any new sentence imposed.[44]

43. *Ex parte Lange, supra*, is an analogous Supreme Court precedent of earlier vintage. There, the District Court had imposed both the maximum prison term and the maximum fine when the statute permitted imposition of only one. After the defendant had paid the fine and served five days of his prison term, the District Court realized its error and resentenced him to only the prison term. The Supreme Court granted the defendant's subsequent writ of habeas corpus, finding that the resentencing violated the Double Jeopardy Clause. The original sentence exceeded the statutory maximum, a violation of Due Process; and a resentencing resulted in the imposition of a prison term which had been in part already served. *See generally, Dunsky, supra* note 39, at 28–29. *But cf. North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). A factually different case now before the Supreme Court involves an aspect of the issue before us: *Whalen v. United States*, 379 A.2d 1152 (D.C.App.1977), *rehearing en banc denied*, 388 A.2d 894 (1978), *cert. granted*, 441 U.S. 904, 99 S.Ct. 1991, 60 L.Ed.2d 372 (1979), *argued*, 26 Crim.L.Rep. (BNA) 4113 (Nov. 27–28, 1979) (whether, in a single proceeding, consecutive sentences for rape and felony-murder violate double jeopardy).

44. The Court also held that the Due Process Clause required any increased sentence on retrial to have been based on objective, identifiable factual information which was not known to the sentencing judge at the time of the original sentencing, and that such information had to be disclosed on the record. 395 U.S. at

A year later, *Ashe v. Swenson*, 397 U.S. 436, 446, 90 S.Ct. 1189, 1195, 25 L.Ed.2d 469, 477 (1970), decided "*not* whether [the defendant] could have received a total of six punishments if he had been convicted in a single trial of robbing . . . six victims." Rather the Double Jeopardy Clause was found to incorporate a rule of collateral estoppel which prevented the State from relitigating an issue which was necessarily determined in a prior trial. Thus the Court did not go so far as to require the joinder of all related prosecutions in one proceeding; but the Court did provide a greater degree of protection to the defendant than *Blockburger's* "same evidence" test (in its constitutional context) would have. *See id.* at 448–60, 90 S.Ct. at 1196–02, 25 L.Ed.2d at 478–84 (Brennan, J., concurring). *Ashe* therefore reemphasized that the core concern of the Double Jeopardy Clause is to fully protect a defendant who has been once acquitted or partially punished under a similar statute for the same act, thus protecting the interests of repose and finality.

Iannelli v. United States, supra, was a relatively narrow decision concerning the scope of Wharton's Rule. There, in one proceeding, the defendants were convicted and cumulatively sentenced for running an illegal gambling business in violation of 18 U.S.C.A. § 1955 and of conspiracy (under the general conspiracy statute, 18 U.S.C.A. § 371) to run such a business. Double jeopardy was at issue by way of the argument that Wharton's Rule prohibited such dual convictions and that the Rule was a part of the protection afforded by the Double Jeopardy Clause. The Court found that the Rule did not rest on principles of double jeopardy, 420 U.S. at 782, 95 S.Ct. at 1292, 43 L.Ed.2d at 625, but instead was a tool of statutory construction. The Court then examined the legislative intent, which was found to permit imposition of cumulative sentences. In a long footnote which proved the font of later confusion, *Blockburger* was described *solely* as a tool of statutory construction, although the Court then proceeded to apply the test and find the offenses separate. *Id.* at 785 n. 17, 95 S.Ct. at 1293 n. 17, 43 L.Ed.2d at 627 n. 17. *Iannelli* therefore seemingly limited *Blockburger* and implied that legislative intent was the sole determinant of whether cumulative punishments were permitted, at least in a single proceeding.

Two years later, the Court sought to further clarify *Iannelli*. In *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977),[45], the Court affirmed in part and vacated in part the judgment of the Court of Appeals, which had relied upon *Iannelli*. Defendant Jeffers had originally been indicted for conspiracy to distribute narcotics, in violation of 21 U.S.C.A. § 846, and for the greater offense of conducting a continuing criminal enterprise to violate the narcotics laws, in violation of 21 U.S.C.A. § 848. Jeffers opposed the Government's efforts to try the two charges in one proceeding. Consequently, he was tried first for § 846 conspiracy, and after

723–26, 89 S.Ct. at 2079–81, 23 L.Ed.2d at 668–70. *See also Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973).

45. *Jeffers* also interpreted the decision simultaneously decided, *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). In discussing and distinguishing *Brown*, the *Jeffers* plurality stated: "What lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for the 'same offense.'" 432 U.S. at 150, 97 S.Ct. at 2216, 53 L.Ed.2d at 180.

conviction was brought to trial on the § 848 charges, which resulted in a second conviction. The punishments were made consecutive: (i) for § 846, 15 years in prison, a special parole term, and a $25,000 fine; (ii) for § 848, life imprisonment and a $100,000 fine. The defendant appealed, contending that his § 848 conviction and sentence violated the Double Jeopardy Clause.

The Supreme Court first dealt with the defendant's claim that a second *prosecution* was improper. In contrast to the Court of Appeal's holding that legislative intent controlled the reprosecution issue, the Supreme Court held that *Blockburger*, in its constitutional context, should be used. The Supreme Court found the offenses to be the "same" under that test, but nevertheless upheld the separate prosecutions because the defendant had essentially waived his rights by opposing the Government's attempts to consolidate the charges.[46]

Having resolved the reprosecution issue, the Court was left with the problem of the cumulative punishments which the defendant received. This was a problem similar to the one before us today—whether double jeopardy precludes cumulative punishment where a defendant is tried under two separate statutes in one proceeding.[47] *Jeffers* treated this problem as one entirely separate from the more central reprosecution issue. In resolving the problem of cumulative punishment, *Jeffers* unmistakenly looked only to congressional intent:

> The critical inquiry is whether *Congress intended* to punish each statutory violation separately. . . . In *Iannelli v. United States*, the Court concluded that *Congress did intend* to punish violations of § 1955 separately from § 371 conspiracy violations. Since the two offenses were different, there was no need to go further. . . . If some possibility exists that two statutory offenses are the "same offense" for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties. See *North Carolina v. Pearce*, 395 U.S. at 717 [89 S.Ct. at 2076]; *United States v. Wilson*, 420 U.S. [332] at 343 [95 S.Ct. 1013 at 1021, 43 L.Ed.2d 232].

432 U.S. at 155, 97 S.Ct. 2218, 53 L.Ed.2d at 183 (citations and footnote omitted) (emphasis supplied).[48]

The meaning of the above quoted passage is indicated by the fact that immediately thereafter the opinion proceeded to analyze the words of the two statutes and their legislative history. The intent of Congress was the "critical inquiry." *Jeffers* concluded that Congress had *not* intended to allow cumulative imposition

46. The waiver reasoning was the product of four Justices, while Mr. Justice White concurred only in the result of that reasoning. *See* 432 U.S. at 159 n. 7, 97 S.Ct. at 2227 n. 7, 53 L.Ed.2d at 186 n. 7 (Stevens, J., dissenting in part and concurring in part in the judgment).

47. "[B]oth parties . . . appear to have assumed that no cumulative punishment problem is present in this case,[23] . . . ." *Id.* at 154, 97 S.Ct. at 2218, 57 L.Ed.2d at 182. In the footnote 23 the Court elaborated: "Even if the two indictments had been tried together, the cumulative-punishment issue would remain."

48. The last quoted sentence refers to the *Pearce* problem, not relevant in *Jeffers* nor in the case before us.

Mr. Justice White, concurring in part and dissenting in part, supported reliance on congressional intent but reached a different conclusion as to the nature of that intent.

of the $25,000 and $100,000 fines.[49] Consequently the Court ordered that the fine assessed not exceed $100,000, although the prison sentences were affirmed.

[14] *Jeffers* therefore teaches that the analysis of reprosecution following conviction on similar charges or following acquittal[50] is entirely separate from that of cumulative punishments, rendered in a single proceeding. The cumulative punishment issue requires an analysis of legislative intent—albeit an intent found lacking in *Jeffers*. The principle is therefore that the Double Jeopardy Clause requires only that courts punish within the limits that Congress intended. Cumulative punishment, when imposed in one proceeding (or in separate proceedings as the result of a defendant's desire to have the proceedings separate), is proper so long as Congress intended to permit such cumulative punishment.

As further support for this interpretation, we borrow an argument from *Gore v. United States, supra*, 357 U.S. at 392–93, 78 S.Ct. at 1284–85, 2 L.Ed.2d at 1410–11, where the Court upheld three cumulative sentences imposed for a single sale of narcotics. The argument, as adapted, asks us to suppose that Congress, instead of enacting 21 U.S.C.A. §§ 846 & 963, enacted the following:

> Any person who enters into a conspiracy to both import and to distribute marijuana is punishable by a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both: *Provided, however,* That if he conspires only to import marijuana he is only punishable by a term of imprisonment of up to 5 years, a fine of not more than $15,000, or both: *Provided, however,* That if he conspires only to distribute marijuana he is only punishable by a term of imprisonment of up to 5 years, a fine of not more than $15,000, or both.

As *Gore* held, there clearly would be no double jeopardy problem were the defendants sentenced under such a statute. Yet it has been shown that such a statute was what Congress intended to effect in enacting the two specific conspiracy statutes contained in the Drug Control Act. *See United States v. Marotta, supra.*

Appellants argue, however, that more than congressional intent is involved; that the *Blockburger* test must be applied even where reprosecution is not at issue. They, like the panel, 585 F.2d at 1248–49, rely on *Braverman* for the proposition that a single conspiracy with dual objectives is but one offense, which Congress *cannot* further fragment. But as cogently observed by Westen and Drubel, *supra* note 39, at 113–15:

> . . . [T]his thesis assumes that "same offense" has substantive content that is independent of domestic

49. In a relevant footnote the Court observed:

> The Congress was plainly interested in punishing the professional criminal severely when it passed § 848. . . . Taken alone, this might support an argument for cumulative penalties. . . ."

432 U.S. at 156 n. 26, 97 S.Ct. at 2218 n. 26, 53 L.Ed.2d at 184 n. 26 (citations omitted). The Court found explicit legislative history suggesting that the fines not be cumulative, however. Consequently, the Court did not find sufficient legislative history favoring cumulative punishments.

50. Reprosecution is the core of the Double Jeopardy Clause, and there the Clause—through the *Blockburger* test and the principle of *Ashe v. Swenson, supra*—acts as a limitation on Congress and the Government.

law as defined by the legislature, [thus demanding] more of the Double Jeopardy Clause than it is capable of supplying.

. . . [T]he argument assumes that the Double Jeopardy Clause is capable of reducing the concept of a criminal offense to its smallest rational unit, or atom, beyond which further fragmentation cannot occur without creating a "doubling effect."

* * * * * *

. . . The flaw . . . is to assume that there is an objective basis for determining the maximum number of statutory offenses implicit in a single course of conduct. There is simply no way to make sense out of the notion that a course of conduct is "really" only one act.

[15, 16] In deference to this observation, we feel that the Supreme Court in action as well as words [51] has recognized that the Double Jeopardy Clause imposes no limits on Congress's power to define the allowable unit of prosecution and punishment, at least so long as all charges are brought in a single proceeding. This is not to say that Congress could so fragment a conspiracy that the aggregate punishment becomes cruel and unusual, but protection from that action derives from the Eighth Amendment, not the Double Jeopardy Clause. *See United States v. Marotta, supra* at 685.

Nor would the *Blockburger* test afford protection if applied to the conspiracy statutes here. For, as indicated, *supra* Slip opinion at 3472–3473, at ——— ———, each statute requires an element that the other does not. We look to the elements of the statute, not the evidence adduced at trial. *United States v. Cowart, supra.* The difference in the objectives of the conspiracy would in any event satisfy the *Blockburger* test.[52]

We conclude with a cautionary admonition. First, our holding that double jeopardy is not offended by these conspiracy charges brought in a single proceeding does not extend to the multiple prosecution area, and the Government would be well-advised to bring all of its charges (relating to a single conspiracy) in a single proceeding. *Cf. Ashe v. Swenson, supra.* Second, we caution the District Courts that our holding does not require the imposition of consecutive sentences but rather only permits such imposition, within the sound discretion of the sentencing forum.[53]

The result of our decision today is to alter the panel's reasoning while reaffirming its disposition of the convictions and sentences of the four defendants. Thus we let stand the panel's reversal of the convictions of Smigowski and Martins with respect to Count II and the affirmance with respect to Count I. The convictions and sentences under both counts of Rodriguez and Albernaz are

51. *See also Sanabria v. United States*, 437 U.S. 54, 169, 98 S.Ct. 2170, 2181, 57 L.Ed.2d 43, 57 (1978); *Brown v. Ohio, supra*, 432 U.S. at 165, 97 S.Ct. at 2225, 53 L.Ed.2d at 193–94.

52. We do not find that a single sentence of "dictum-on-top-of-dictum" changes our reliance upon the intent of Congress: "The Double Jeopardy Clause is no less offended because the Government here seeks to try petitioner twice for this single offense, instead of seeking to punish him twice as it did in *Braverman.*" *Sanabria v. United States, supra*, 437 U.S. at 74, 98 S.Ct. 2184, 57 L.Ed.2d at 60.

53. We have considered appellants' argument of prosecutorial abuse of discretion, and find it without merit. *Cf. United States v. Batchelder*, — U.S. ——, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); *United States v. Brown*, 602 F.2d 909 (9th Cir. 1979).

affirmed. As did the panel we direct that the case be remanded with instructions to dismiss the Count II convictions of Smigowski and Martins.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

ALVIN B. RUBIN, Circuit Judge, dissenting:

The offense of conspiracy lies in the agreement alone. *United States v. Alvarez*, 610 F.2d 1250 (5th Cir. 1980); *United States v. Suarez*, 608 F.2d 584 (5th Cir. 1979); *see United States v. Falcone*, 109 F.2d 579 (2d Cir.), aff'd, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940). It "is an inchoate offense, the essence of which is an agreement to commit an unlawful act." *Iannelli v. United States*, 420 U.S. 770, 777, 95 S.Ct. 1284, 1289, 43 L.Ed.2d 616, 622 (1975); *accord, United States v. Conroy*, 589 F.2d 1258, 1269 (5th Cir.), *cert. denied*, —— U.S. ——, 100 S.Ct. 60, 62 L.Ed.2d 40 (1979).

As the majority opinion makes clear, the defendants were charged with entering into only one agreement, and only one agreement was proved; that agreement had two objectives, importing marijuana and distributing it.[1] Though the charge described overt acts, it was unnecessary for the prosecution to charge or to prove any act in furtherance of the conspiracy (majority opinion, n. 37 *supra*) and, therefore, according to the majority's opinion, the single agreement itself constituted two crimes, punishable twice, the instant there was assent, whether express or by wink or handshake, and whether or not anything further was ever done to accomplish the illicit bargain. For that one agreement the defendants were charged with violating two separate provisions enacted by a single law, convicted of violating both and sentenced to separate and consecutive sentences.

I respectfully disagree with what seems to me to be both an erroneous conjecture of the unarticulated purpose behind enactment of the statute and a failure to grant the defendants the protection of the double jeopardy clause.[2]

Each of the sections of the law which the defendants were convicted of violating, 21 U.S.C. §§ 846 and 963, prohibits a conspiracy to violate any provision of the Title in which it is contained. Each is contained in a different Title of a single law, the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub.L. No. 91–513, 84 Stat. 1236. Each

1. The offense of conspiracy to *distribute* was inferred from the quantity of marijuana involved in the conspiracy to import.

2. Although I follow the lead of my brethren by separately discussing congressional intent and the double jeopardy issue in this case, I believe an overly sharp distinction may depreciate the significance of the double jeopardy clause in matters of statutory interpretation. If the clause has any effect on the decision whether to cumulatively punish behavior that may violate two statutory sections, at the least it demands that the rules of statutory interpretation should be weighed most favorably to a defendant in determining what Congress intended. *Cf. Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 914, 55 L.Ed.2d 70 (1978); *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955). *See generally* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 Sup.Ct.Rev. 81, 106–24. I think by their sharp distinction between statutory interpretation and the force of the double jeopardy clause, my brethren fail to give it even this minimal effect. This is particularly distressing since our very discretion to interpret statutes to permit double punishment is one of the exercises of power the double jeopardy clause seeks to restrain. *See Brown v. Ohio*, 431 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187, 193 (1977).

manifests an intention by Congress, in dealing with illegal traffic in drugs, to strike against group activity in drug traffic. Ordinarily, a single section forbidding any conspiracy to violate substantive provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970 would have sufficed to address the problem. However, because the responsibility for drafting the importation and distribution provisions in the Act was divided between two congressional committees, each committee was careful to ensure that a conspiracy to violate the provisions it drafted was made illegal. From this accident of legislative development of the statute and Congress's failure in reviewing the work of its two committees to consolidate the twin conspiracy provisions that resulted, my brethren now conclude by a grudging reading of Supreme Court precedent that a single conspiracy to violate the provisions of the Act can be punished twice.

They reach this troubling result by saying that the conspiracy sections of the statute proscribe "*acts* of thought and agreement." Majority opinion, slip op. p. 3463 *supra* (Emphasis supplied). Leaving aside the patently dubious proposition that "acts of thought" may ever be made criminal, calling an agreement an act may accommodate our customary taxonomy but it does not alter the nature of the offense. What is proscribed by criminalization of conspiracy is the purely consensual compact to engage in a crime. One illegal agreement must be distinguished, as the Supreme Court has told us, "from a single act which violates two statutes." *Braverman v. United States*, 317 U.S. 49, 54, 63 S.Ct. 99, 102, 87 L.Ed. 23, 28 (1942).

My brethren acknowledge the authority of *Braverman* but make an effort to distinguish it, saying that it limits only "the Government's ability to fragment a single conspiracy under *the general conspiracy statute*." Majority opinion, n. 16 *supra* (their emphasis). This is not an adequate basis for reaching a different result from the one determined in *Braverman*. Here there was but one conspiracy regardless whether it is declared illegal by what my brethren consider two discrete laws, 21 U.S.C. §§ 846 and 963, or by one law, former 18 U.S.C. § 88, considered in *Braverman*. *Cf. Developments in the Law—Criminal Conspiracy*, 72 Harv.L.Rev. 920, 964–966 (1959); W. LaFave & A. Scott, Handbook on Criminal Law § 62, at 479–480 (1972). Moreover, I submit that the provisions we here consider are in fact but two parts of one law, Pub.L. No. 91–513 (1970), although that enactment was divided into multiple sections. However, whether there was one statute or two, there was one agreement and, as the court said in *Braverman*: "[t]he one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one." 317 U.S. at 53, 63 S.Ct. at 102, 87 L.Ed. at 28. I see little difference between fragmenting a conspiracy according to the number and diversity of its objectives in order to charge several violations of a single statute, and using the same technique to charge violations of two statutory provisions. The teaching of *Braverman* is that a conspiracy cannot be so fragmented.

If, as the majority finds, *Braverman* is limited to the interpretation of one statute, the general conspiracy statute, and its rule is to be distinguished from the interpretation of two separate sections of a law enacted by a single vote of Congress, nothing in it tells us so. If

Congress in the Comprehensive Drug Abuse Prevention and Control Act of 1970, intended to adopt a different policy from the purpose that the Supreme Court had found in the statute construed in *Braverman*, it failed to say so in the statute and nothing in the legislative history, so extensively examined by the majority, supports the view that Congress merely failed to articulate its intention. Both statute and congressional proceedings are simply silent. If, in this instance, silence speaks louder than words, what it says is that we should not consider it eloquent of a purpose to change.

That Congress intended to punish severely those involved in the drug trade is evident. It demonstrated this intention not only by enacting the drug control law but by the penalties permitted in that law. That Congress made criminal both a conspiracy to import a controlled substance and a conspiracy to distribute it is patent. Finally, it is clear that Congress intended to permit separate punishments for the substantive *acts* of importation and distribution of controlled substances (incorrectly, I suggest, referred to by the majority as "the substantive *act* of importation and distribution," majority opinion, slip op. p. 3470 *supra* (emphasis changed), for one can hardly import and distribute by a single act).

However, those premises do not lead to the conclusion that, *therefore*, Congress intended to permit *one agreement* to be prosecuted under two sections of the same law and punished by two consecutive sentences. *Cf. Jeffers v. United States*, 432 U.S. 137, 156 n. 26, 97 S.Ct. 2207, 2219 n. 26, 53 L.Ed.2d 168, 184 n. 26 (1977) (Congress's intent to punish severely in drug cases does not conclusively determine that it intended cumulative penalties). As the majority cautiously observes, Congress is a body of lawyers. As such it can be expected, indeed presumed, to be aware that a conspiracy statute outlaws the agreement itself, and not to intend, by a division of drafting responsibility, to permit courts to punish a single agreement twice. The majority's conclusion, I respectfully submit, is not supported by any express statutory provision or by legislative history and is "based on no more than a guess as to what Congress intended," *Ladner v. United States*, 358 U.S. 169, 178, 79 S.Ct. 209, 214, 3 L.Ed.2d 199, 205 (1958).

Of course, if there are two separate and distinct conspiratorial agreements, then there are two crimes. This was the situation in *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946). Although the opinion in that case does not tell us whether the theory of the prosecution was that there were two agreements or merely one, the instructions to the jury, published in ABA Section of Antitrust Law Jury Instructions in Criminal Antitrust Cases 180–81, (1965), make it clear that two separate conspiracies were charged.[3] This is the basis for the

3. The Supreme Court also reads *American Tobacco* to allow cumulative punishment only of two separate conspiracies. In *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 2184, n. 33, 57 L.Ed.2d 43, 60 n. 33 (1978), considering a conviction for the substantive crime of conducting an illegal gambling business, it said, "If two *different* gambling businesses were alleged and proven, separate convictions and punishments would be proper" (emphasis in original) (citing *American Tobacco*), and characterized *American Tobacco* as "holding *Braverman* inapplicable where two distinct conspiracies [are] alleged." It continued, "It is not always easy to ascertain whether one or more gambling businesses have been proven under [18 U.S.C.] § 1955. . . . *No such difficulties are presented here because both sides agree that only a single gambling business existed.*" *Id.* (emphasis supplied).

Court's statement in the *American Tobacco* opinion that the convictions for conspiracy to monopolize and conspiracy in restraint of trade required "proof of *conspiracies* which are reciprocally distinguishable from and independent of each other although the objects of the conspiracies may partially overlap." 328 U.S. at 788, 66 S.Ct. at 1129, 90 L.Ed. at 1582 (emphasis supplied). No such showing was made in this case.

My brethren fully sum up the divergent results reached by the other circuit courts. All of these courts agree, however, that Congress has the power to enact overlapping statutes and that defendants can be prosecuted and convicted under each simultaneously, for it might be difficult or impossible for the grand jury definitely to determine in advance which set of laws the conspiracy would violate if proved. Accepting this, the final question is the one here presented; I believe the sounder view of statutory construction is that, if the defendants are convicted of violating both provisions by a single agreement, they can be sentenced only once, whether tried in a single or separate trial.

In interpreting statutes making criminal such essentially preparatory conduct as conspiracy, we must balance interests, weighing both the threat created by intrigue to violate the law and the consideration that the legislature has outlawed a simple concert of minds and words. The implications of making not one but two crimes out of a purely verbal agreement, and, indeed, of what my brethren even embrace as the parties' "thoughts," ought to be considered in evaluating congressional intent and in reading the fifth amendment.

Because the interpretation of the two sections to permit the imposition of two sentences for one agreement would raise serious constitutional questions concerning double jeopardy, and because it is not clear either from the statute or its history that Congress intended this result (as distinguished from a general purpose of punishing severely those engaged in drug trade and attempting to control that trade), I would resolve this case by construing the statute so as to avoid the constitutional issue. *See Simpson v. United States*, 435 U.S. 6, 11–13, 98 S.Ct. 909, 912–913, 55 L.Ed.2d 70, 76–77 (1978); *Jeffers v. United States*, 432 U.S. 137, 155, 97 S.Ct. 2207, 2218, 53 L.Ed.2d 168, 182 (1977).

However, if we accept the construction adopted by the majority and conclude that Congress intended to permit one agreement to be punished by the court as two crimes, we must consider whether this result was forbidden by the double jeopardy clause of the sixth amendment.

While the "core concern" of the double jeopardy clause is to protect against successive trials, the present Supreme Court, like its predecessors, considers it also to prohibit multiple punishment for the same offense. "The Double Jeopardy Clause," the Court observed in *Simpson v. United States*, 435 U.S. 6, 11 n. 5, 98 S.Ct. 909, 912 n. 5, 55 L.Ed.2d 70, 76 n. 5 (1978), " 'protects against multiple punishment for the same offense,' *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), *and* prohibits multiple prosecutions for the 'same offense,' *Jeffers v. United States*, 432 U.S. 137, 150–151, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168 (1977)." (Emphasis supplied.) If that were doubtful, we could turn to the even more detailed

but no less explicit language in *North Carolina v. Pearce*, 395 U.S. 711, 716, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656, 664 (1969), quoted in the footnote.[4]

This is no new doctrine. It was announced when *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872, was decided in 1874: [T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." 85 U.S. at 173, 21 L.Ed. at 878.

None of these cases considered factual situations identical to the one before us. Yet they and the host of other double jeopardy decisions reviewed by my brethren rest on the thesis that two punishments for one offense violate the double jeopardy clause. A fundamental provision of the Bill of Rights should not be applied narrowly as a result of a fastidious effort to distinguish each possible precedent.[5]

The majority opinion concludes, "*[T]he Double Jeopardy Clause imposes no limits on Congress's power to define the allowable unit of prosecution and punishment, at least so long as all charges are brought in a single proceeding.*" Slip op. p. 3479 *supra* (emphasis supplied). I take it that they would add that the double jeopardy clause does not limit the power of the courts to impose separate punishments for all charges brought in a single proceeding. This is the crux of our difference. I submit that, however difficult it may be to define "units of prosecution," if the crime is conspiracy and there is but one agreement, there can be but one punishment even though there may be multiple charges; the imposition of two sentences is double jeopardy.

In this respect the analogy between a conspiracy and a substantive crime is misleading. Conspiracy, like attempt, stigmatizes a nascent offense. *Alvarez v. United States*, 610 F.2d 1250 (5th Cir. 1980). A single *act* may constitute two offenses if it violates two *substantive* statutes. This may be the result if the

4. "The Court has held today, in *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707, that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. *And it protects against multiple punishments for the same offense.*" *North Carolina v. Pearce*, 395 U.S. 711, 717 & n. 11, 89 S.Ct. 2072, 2076 & n. 11, 23 L.Ed.2d 656, 664 (1969) (emphasis supplied, footnotes omitted) (citing *Ex parte Lange*, 18 Wall. 163, 21 L.Ed. 872; *United States v. Benz*, 282 U.S. 304, 307, 51 S.Ct. 113, 114, 75 L.Ed. 354; *United States v. Sacco*, 2 Cir., 367 F.2d 368; *United States v. Adams*, 6 Cir., 362 F.2d 210; *Kennedy v. United States*, 9 Cir., 330 F.2d 26).

5. The labor my brethren take to distinguish *Iannelli v. United States*, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975), and *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), seems to me ill-spent. *Iannelli* turns only on statutory construction, and *Jeffers*, a successive prosecution case, likewise dealt solely with statutory construction. *Jeffers* fairly read, I submit, does not "[teach] that the analysis of reprosecution following conviction on similar charges or following acquittal is entirely separate from that of cumulative punishments, rendered in a single proceeding," majority opinion, slip. op. p. 3478 *supra* (footnote omitted). *Gore v. United States*, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958) does put emphasis on statutory construction, but it later makes clear that there is double jeopardy if a person is punished for "different descriptions of the same offense" and not for each of several separate offenses. *Id.* at 392, 78 S.Ct. at 1284, 2 L.Ed.2d at 1410.

act has two separate consequences, and each consequence of the act completes a different crime. If a defendant kills two persons by one gun shot, the offense of homicide is not completed merely by pulling the trigger; it is the act of shooting the gun and the resultant death that together constitute homicide. *See Gore v. United States*, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958), (involving the violation of several substantive statutes by one act of sale). An act may also be a course of conduct, each separate facet of which may be a crime.

We need not at this time explore all of the difficult and, to some extent, still unresolved problems of whether and to what extent the double jeopardy clause acts as a restraint on the power of Congress to define what is the criminal conduct punished and to divide a single act or course of activity into fragments or units of punishment, each labelled a separate crime, provided only that Congress do so with sufficient clarity and demonstrated purpose. We here consider only conspiracies, that is, agreements. Agreements are not acts. Even if a single *agreement* has more than one unlawful *objective* it does not truly constitute more than one *conspiracy*; it is the *agreement* per se that is illegal in a conspiracy and indeed, is coextensive with it.[6]

If Congress wished to increase the permissible penalty for conspiracy to import marijuana from five years to 15 years, or to impose any other penalty short of one forbidden as cruel and unusual punishment, it might do so.[7] If it wished to increase the penalty for a conspiracy to distribute, it might do so. What it cannot do is legislatively to give a court power to punish doubly for a single violation of the law.

All law, but particularly the criminal law, is and ought to be founded in good sense. Its intricacies ought at least to be explicable. The majority opinion almost recognizes explicitly that, if the government had chosen to prosecute the defendants for conspiracy to import and then separately for conspiracy to distribute, this would violate the Constitution. They pause on the brink of going quite that far by a "cautionary admonition" to the government, suggesting that it "would be well-advised to bring all of its

6. Of course, the difficulties inherent in saying any physical act cannot be divided into more than one offense are well-known. *See Gore v. United States*, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958); Westen & Drubel, *supra*, note 2. But it requires a metaphysician or a neuropsychologist to find the same difficulty with "acts of thought." I believe this is a proper case to conclude that a single, simple agreement cannot be fragmented into multiple crimes by Congress or the courts. Although the Supreme Court has never directly addressed the limits "imposed by the Double Jeopardy Clause on the legislative power to define offenses," *Sanabria v. United States*, 437 U.S. 54, 69, 98 S.Ct. 2170, 2181, 57 L.Ed.2d 43, 57 (1978), neither has it concluded, as the majority appears to, that there are no such limits.

7. The terms of imprisonment for the three defendants who received consecutive sentences on the conspiracy counts each exceeded the statutory maximum for either conspiracy to import marijuana or conspiracy to distribute. Rodriguez was sentenced to imprisonment for four and one-half years on each count, the sentences to be served consecutively. Albernaz was sentenced to imprisonment for three and one-half years (42 months) on each count the sentences to be served consecutively Smigowski was sentenced to imprisonment for three years on each count, the sentences to be served consecutively. Martins was sentenced to three years on each count, the sentences to be served concurrently.

charges (relating to a single conspiracy) in a single proceeding," majority opinion slip. op. p. 3479 *supra*.

Why there would be double jeopardy if the same court were to impose two sentences after two trials and not if it were to impose two sentences after one is difficult to comprehend. To conclude that the double jeopardy clause protects one agreement from successive prosecutions but that, if the government elects to prosecute that same agreement under two separate counts in a single case, the judge can impose a double sentence appears to me to offend the logic that should govern constitutional interpretation. It is no easier to characterize the two crimes here charged as the "same offense" under the fifth amendment for prosecution than it is for punishment. *See Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 2184, 57 L.Ed.2d 43 (1978).

Even in construing laws designed to protect our shores against importers of a noxious weed, we must apply proper standards of statutory interpretation and fundamental constitutional principles or we are in jeopardy of succumbing to the temptation of making the punishment fit what we believe to be the crime.

Supreme Court of the United States.

No. A-806

THOMAS J. ALBERNAZ, ET AL.,
PETITIONERS,

v.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 27, 1980.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 19th day of March, 1980.